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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., *et al.*,
Petitioners,

vs.

STATE OF UTAH, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPENDIX.

In Two Volumes.

Volume II.

(Pages 313 to 535).

Complaint.

(Jury Demanded).

United States District Court, District of Utah, Central Division.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. C-177-69.

The State of Utah, plaintiff by its attorneys, acting under the direction of the Attorney General of Utah, brings this civil action on its own behalf and on behalf of all other public bodies, agencies, political subdivisions and districts of the State of Utah similarly situated and on behalf of other states and their public bodies, agencies, and subdivisions for treble the amount of damages suffered by it and by each other member of the class due to the defendants' violations of the antitrust laws of the United States. Plaintiff demands a trial by jury and alleges as follows:

FIRST CAUSE OF ACTION

I

CLASS ACTION

1. Plaintiff brings this action for itself separately and as a representative of a class on behalf of all of the members thereof. The class represented by plaintiff is composed of those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants, co-conspirators and others.

2. The class also includes all other states in the Western Area, as hereinafter defined, which have not previously filed a similar action including the states of Wyoming, Nevada and Idaho and includes those public bodies and agencies of state and local government in said states who are end users of pipe acquired from defendants, co-conspirators and others.

3. The class is so numerous that joinder of all members is impractical and there are questions of law or fact common to the class. The claims of plaintiff as representative are typical of the claims of the class, and plaintiff as representative acting through its Attorney General, will fairly and adequately protect the interests of the class.

II

JURISDICTION AND VENUE

4. This complaint is filed and the jurisdiction of this Court is invoked under the provisions of Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages for injuries to its business or property which the State of Utah and each member of the class has sustained due to violations by the defendants of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. § 1), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

5. Each corporate defendant maintains an office, transacts business, is found, resides, or has an agent

in the District of Utah, and each of said corporate defendants is within the jurisdiction of this Court for the purpose of service.

6. The interstate trade and commerce described herein is carried on in part within the District of Utah. Many of the unlawful acts done pursuant to the combination and conspiracy hereafter alleged have been performed within the District of Utah.

III
DEFINITIONS

7. As used herein the term:

(a) "Steel small diameter pressure pipe" (herein referred to as "steel SDP pipe") means thin-walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch.

(b) "Alternate small diameter pressure pipe" (herein referred to as "alternate SDP pipe") means small diameter pressure pipe (herein referred to as "SDP pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete SDP pipe or steel SDP pipe.

(c) "Steel large diameter pressure pipe" (herein referred to as "steel LDP pipe") means heavy-walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch.

(d) "Alternate large diameter pressure pipe" (herein referred to as "alternate LDP pipe") refers to large diameter pressure pipe (herein referred to as "LDP

pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete LDP pipe or steel LDP pipe. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated with concrete.

(e) "Concrete pipe" means pipe constructed of concrete either with or without metal components as hereinafter defined to convey water and sewage and includes both pressure and non-pressure pipe.

(f) "Metal components" refers to the steel plates, sheets, skelp, rods, wire and/or mesh used in the manufacture of concrete pipe and to the steel plate and sheets used in the manufacture of steel SDP and LDP pipe.

(g) "Western Area" refers to the states of California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii.

(h) "End users" means consumers who purchase and install or have installed any of the types of pipe above defined in systems primarily for the conveyance of drinking water and sewage under pressure and for drainage, irrigation, flood control and similar purposes.

IV
DESCRIPTION OF THE PARTIES

8. Plaintiff, the State of Utah, through its departments, divisions, agencies, institutions, universities and colleges, is an end user of the types of pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

9. The class represented by plaintiff is composed of all of the political subdivisions of the State, including counties, cities, and municipalities. It also includes districts comprising public entities organized under the laws of Utah, including, but not limited to irrigation, flood control, sewer and water districts. Many of these political subdivisions and districts are end users of the pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

10. The class also includes all other states in the Western Area which have not previously filed a similar action including the states of Wyoming, Nevada and Idaho and their departments, divisions, agencies, institutions, universities and colleges. The class includes all of the political subdivisions of said states, including counties, cities, and municipalities. It further includes districts comprising public entities organized under the laws of said states. Said states and many of their public bodies, agencies, political subdivisions, and districts are end users of the pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

11. The State of Utah and its political subdivisions and districts and the other states in the Western Area including the states of Wyoming, Nevada and Idaho, together with their political subdivisions and districts are a class of persons herein called "public and users."

12. The State of Utah and the other public end users own, construct, alter, maintain and operate water and sewage projects, highways and other facilities for

the rendering of public services and, by means of awarding public construction contracts, acquire materials and services, including pipe as defined herein.

13. Defendants:

(a) Defendant American Pipe and Construction Company (hereinafter called "American") is a corporation existing under the laws of the State of California with its principal place of business in Monterey Park, California. American is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(b) Defendant United Concrete Pipe Corporation (hereinafter called "United") is a corporation organized and existing under the laws of the State of California with its principal place of business in Baldwin Park, California. United is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(c) Defendant Utah Concrete Pipe Company (hereinafter called "Utah Pipe") is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Ogden, Utah. Utah Pipe is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(d) Defendant W. R. White Company (hereinafter called "White") is a corporation organized and existing under the laws of the State of Utah with its principal

place of business in Ogden, Utah. White is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(e) Defendant United States Steel Corporation (hereinafter called "U.S. Steel") is a New Jersey corporation which in 1948 acquired the Consolidated Western Steel Corporation, which during the period of the conspiracy herein alleged it operated as a division of U.S. Steel. During this time U.S. Steel, among other things, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(f) Defendant Kaiser Steel Corporation (hereinafter called "Kaiser") is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Oakland, California. Kaiser was, during the period of time covered by this complaint, engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(g) Defendant Smith-Scott, Inc. (hereinafter called "Smith-Scott") is a corporation organized and existing under the laws of the State of California, with its principal place of business in Riverside, California. Smith-Scott, among other things, is engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(h) Defendant U.S. Industries, Inc. (hereinafter called "U.S.I.") is a Delaware corporation which in

1955 purchased the assets of Southern Pipe and Casing, which during the period of the conspiracy herein alleged, it operated as the Tubular Products Division of U.S.I. with offices in Azusa, California. During the period of the conspiracy herein alleged, U.S.I., through its Tubular Products Division, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

14. Martin-Marietta Corporation (hereinafter called "Martin-Marietta") and various other corporations, partnerships and individuals engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area, are named as co-conspirators herein. Each of them participated with defendants and with other co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

V

NATURE OF TRADE AND COMMERCE

15. The defendants Smith-Scott, U.S.I. and U.S. Steel are the principal manufacturers of steel SDP pipe in the Western Area. Total sales of steel SDP pipe by these defendants during the period May, 1958 through January, 1962 averaged at least $13,500,000 annually.

16. Defendants American, Smith-Scott, U.S.I., U.S. Steel and United are the principal manufacturers of alternate SDP pipe in the Western Area. Total sales of alternate SDP pipe by these defendants during the period 1957 through 1961 inclusive averaged approximately $18,000,000 annually.

17. The defendants American, Kaiser, United and U.S. Steel are the principal manufacturers of alternate LDP pipe in the Western Area. Total sales of alternate LDP pipe by these defendants during the period 1958 through 1961 inclusive averaged at least $15,000,000 annually.

18. The defendants Kaiser and U.S. Steel are the principal manufacturers of steel LDP pipe in the Western Area. Total sales of steel LDP pipe by these defendants during the period 1958 through 1961 inclusive, averaged at least $7,000,000 annually.

19. The defendants American and United are the principal manufacturers of concrete pipe in the Western Area. Total sales of concrete pipe by these defendants during the period 1958 through 1961 inclusive averaged at least $41,500,000 annually.

20. The defendants Utah Pipe and White are manufacturers and vendors of some of the types of concrete pipe defined in this complaint. During the period of the conspiracy alleged herein said defendants were significant market factors in at least Utah, a part of the Western Area.

21. The co-conspirator Martin-Marietta is a manufacturer and vendor of concrete pipe of the types defined in this complaint. During the period of the conspiracy alleged herein Martin-Marietta was a significant market factor in the Western Area.

22. The construction of systems utilizing the types of pipe herein defined is customarily contracted for by the public end user with general contractors on the basis of competitive bids. Where it is appropriate and desired by the end user, the end user drafts or has drafted specifications allowing the use of steel LDP

or SDP, concrete or either steel or concrete LDP or SDP pipe in the alternative.

23. Prior to submitting bids to the end user, the general contractor usually solicits quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where it is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with the pipe manufacturer for the purchase of said pipe and usually on the basis of competitive bidding.

24. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated with concrete. When the steel LDP pipe manufacturers plan to submit bids or quotations on an alternate LDP pipe job, they in turn solicit quotations or bids from the concrete LDP pipe manufacturers for the performance of this service. The cost of this service is then incorporated in the quotation or bid submitted to the general contractors or end users by the steel LDP pipe manufacturer.

25. Because of the relatively limited number of manufacturers of the types of pipe defined in this complaint, general contractors and end users frequently solicit quotations and bids from manufacturers outside the state where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipeline and deliver or have delivered said pipe directly to the trench site or as near as possible to the place where it will be installed. During the period of the conspiracies

herein alleged, the defendants herein have manufactured substantial quantities of the types of pipe herein defined at their plants within the Western Area and elsewhere, and in response to solicitations calling for bids on the types of pipe herein defined have sold, shipped and delivered said pipe to job sites outside the state where it was manufactured. Numerous of these job sites were and are situated within the State of Utah, thus the types of pipe herein defined move in a continuous and uninterrupted flow from the place of manufacture, including the plants of the defendants herein to points of installation outside the state where said pipe was manufactured.

26. Steel SDP pipe and steel LDP pipe are fabricated largely from steel sheet and plate. Most concrete pipe is manufactured with metal components to strengthen the pipe, and particularly with respect to concrete pressure pipe to make it water-tight. The defendant manufacturers purchase or produce said steel plate or metal components in anticipation of orders for or to enable them to fill existing orders for the types of pipe herein defined, except non-reinforcd concrete pipe. Substantial quantities of the steel plate or metal components which the defendants use in manufacturing the types of pipe herein defined, except non-reinforced concrete pipe, are produced outside the state where said pipe is manufactured. The movement in interstate commerce of the steel plate and metal components is necessary to the manufacture and sale of said pipe by the defendants in the Western Area, and the defendants and co-conspirators are conduits through which said steel plate and metal components flow in a continuous and uninterrupted stream in interstate commerce from the place where said steel plate or metal

components are produced to the place within the Western Area where they are fabricated into the types of pipe herein defined and on to the installation site.

27. Any restraint upon free competition in the production or sale of the types of pipe herein defined in the Western Area necessarily and directly affects the interstate flow of said pipe and the interstate flow of the sheet and steel plate and the metal components utilized in the manufacture of all of said types of pipe, except non-reinforced concrete pipe.

VI
OFFENSES CHARGED

28. Beginning prior to the year 1954 in the case of concrete pipe and prior to the year 1958 in the case of steel pipe and probably as far back as 1946 in both cases and continuing so far as plaintiff and the other public end users know to the date of the filing of this complaint, the defendants and co-conspirators engaged in an unlawful combination and conspiracy to eliminate competition and stabilize and maintain the prices of the herein defined types of pipe, thereby restraining the hereinabove described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

29. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among and between the defendants

and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations in response to solicitations calling for bids and quotes for the herein defined types of pipe.

(b) To allocate and divide orders for the purchase of the herein defined types of pipe among themselves.

(c) To refrain from competing in the manufacture of certain sizes and types of pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

30. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following:

(a) Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among themselves according to agreed upon percentages.

(b) At such meetings and in subsequent communications by telephone and other interstate communication media, the defendants and co-conspirators agreed between and among themselves as to which manufacturers would submit the low bid and what that bid would be and which manufacturers would refrain from bidding or would submit higher complementary bids not intended to win awards and what those bids would be.

(c) At such meetings and at subsequent meetings, defendants and co-conspirators would agree in certain instances as to the types and sizes of pipe each would manufacture and market in certain geographical areas included in the Western Area.

VII

EFFECTS OF THE CONSPIRACY

31. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among defendants and co-conspirators has been restricted and suppressed.

(b) General contractors and end users were deprived of the right to receive competitive bids and quotes for the types of pipe herein defined and were deceived into believing that collusive and non-competitive bids and quotes were competitive.

(c) Public end users and others engaged in the conveyance and distribution of water and sewage have been denied the right to receive competitive sealed bids as required by law or practice or have been denied a competitive market in connection with their purchases and have been forced to pay high, artificially fixed prices for the type of pipe herein defined.

(d) The cost of the types of pipe herein defined has been arbitrarily increased, fixed and maintained.

(e) The business and property of the plaintiff and the other public end users, as intended by the defendants and co-conspirators, were injured in that they were compelled to pay higher prices for the types of pipe herein defined than they would have had to pay had it not been for the aforementioned combination and conspiracy.

VIII
TOLLING OF THE STATUTE OF LIMITATIONS

32. Plaintiff and the other public end users did not discover said combination and conspiracy until the year 1968. Plaintiff and the other public end users had no knowledge of the said combination and conspiracy or of any facts which might have led to the discovery thereof until after March 10, 1964, when a United States Grand Jury sitting in the Southern District of California, Central Division, returned indictments numbered 33338-42 inclusive, setting out in large part the combinations and conspiracies herein alleged. Plaintiff and the other public end users could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants and co-conspirators through their adoption of elaborate schemes for submitting sham and collusive bids which misrepresented the independence and competitiveness thereof and their resort to secrecy to avoid detection as hereinabove alleged.

33. Since March 10, 1964 and continuing through and one year from the date of the entering of a Consent Decree against the last remaining defendant in a government case, said Consent Decree having been entered on May 24, 1968, the running of the Statute of limitations has been suspended by reason of 15 U.S.C. § 16 (b), commonly referred to as § 5 (b) of the Clayton Act because of the pendency of actions instituted by the United States of America. This complaint is based in part upon matters alleged in those government actions.

34. The defendants Utah Pipe and White were neither defendants in the government actions nor named co-conspirators. As to those defendants, plaintiff and the other public end users had no knowledge of the said combination and conspiracy or any facts which might have led to the discovery thereof prior to at least the year 1968. Plaintiff and the other public end users could not have uncovered the conspiracy as to these defendants at an earlier date by the exercise of due diligence inasmuch as said defendants and other co-conspirators acted together and individually by agreement to conceal the existence of said combination and conspiracy and the acts performed in furtherance thereof. Their adoption of schemes for submitting sham and collusive bids and quotations which misrepresented the independence and competitiveness thereof is but one manifestation of their resort to secrecy.

IX

INJURY TO PLAINTIFF AND MEMBERS OF THE CLASS

35. Since at least 1946 plaintiff and the other public end users have acquired substantial quantities of the types of pipe herein defined which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe plaintiff and the other public end users have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

36. When acquiring said pipe directly from manufacturers, plaintiff and the other public end users have been led and induced by the defendants and co-conspirators, as a result of the illegal combination and con-

spiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, plaintiff and the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

37. When acquiring said pipe through prime contractors, plaintiff and the other public end users have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by the defendants' and co-conspirators' illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, the plaintiff and the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

38. As a result of the alleged illegal combination and conspiracy, plaintiff and the other public end users have been injured and financially damaged by the defendants in an amount which is presently undetermined. Plaintiff and the other public end users specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

X

ADDITIONAL CAUSES OF ACTION ALTERNATIVE TO THE ABOVE FIRST CAUSE OF ACTION

39. As additional causes of action alternative to the above first cause of action plaintiff alleges that commencing at least as early as the year 1954 and continuing until at least 1962, the exact dates being unknown to plaintiff, the defendants and co-conspirators engaged in a continuing course of conduct which consisted of a series of combinations, conspiracies and agreements in restraint of the aforesaid interstate trade and commerce in the types of pipe herein defined. These combinations, conspiracies and agreements are described in the following alternative causes of action. Plaintiff herein alleges and incorporates by reference in each of the alternative causes of action as fully as though there separately set out, Paragraphs I through V, Paragraph VII and Paragraph VIII.

XI

SECOND CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Small Diameter Pressure Pipe)

40. Beginning at least as early as May, 1958 and continuing thereafter until at least January, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants U.S. Steel, U.S.I. and Smith-Scott and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinabove described interstate trade and commerce in steel SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as

amended, entitled "An Act to protect trade and commerce against restraints and monopolies," commonly known as the Sherman Act.

41. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations for the sale of steel SDP pipe; and

(b) To allocate and divide orders for the purchase of SDP pipe among themselves.

42. For the purpose of forming and effectuating and as a part of the aforesaid combination and conspiracy, said defendants did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

43. The aforesaid combination and conspiracy in restraint of the interstate trade and commerce in the types of pipe covered by this paragraph of the complaint was carried out in the manner and with the effects described in Paragraphs VII and VIII.

44. Since at least 1946 plaintiff and the other public end users have acquired substantial quantities of the type of pipe covered in this paragraph of the complaint which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe, plaintiff and the other public end users have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

45. When acquiring said pipe directly from manfacturers plaintiff and the other public end users have been led and induced by the defendants and co-conspirators as a result of the illegal combination and conspiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, plaintiff and the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

46. When acquiring said pipe through prime contractors, plaintiff and the other public end users have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by said defendants' and co-conspirators' illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, the plaintiff and

the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

47. As a result of the alleged illegal combination and conspiracy, plaintiff and the other public end users have been injured and financially damaged by the defendants in an amount which is presently undetermined. Plaintiff and the other public end users specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

XII

THIRD CAUSE OF ACTION

(Combination and Conspiracy Involving Alternate Small Diameter Pressure Pipe)

48. Beginning sometime prior to 1955 and continuing thereafter until at least January, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants U.S. Steel, Smith-Scott, U.S.I., American and United and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

49. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide alternate SDP pipe jobs

so that the manufacturers of steel SDP pipe considered as a group on the one hand and the manufacturers of concrete SDP pipe considered together on the other hand would each obtain an agreed upon percent of all alternate SDP pipe jobs.

50. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things, which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel SDP pipe manufacturer or a concrete SDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

51. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XIII

FOURTH CAUSE OF ACTION

(Combination and Conspiracy Involving Alternate Large Diameter Pressure Pipe)

52. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants American, Kaiser, United and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate LDP pipe in violation of Section 1 of the

Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

53. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide solicitations for alternate LDP pipe so that the manufacturers of steel LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations and the manufacturers of concrete LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations, the amount of business involved in the lining and coating of the steel LDP pipe by the concrete LDP pipe manufacturers being included in the share to be obtained by the concrete LDP pipe manufacturers.

54. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel LDP pipe manufacturer or a concrete LDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

55. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XIV

FIFTH CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Large Diameter Pressure Pipe)

56. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants Kaiser and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in steel LDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

57. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of steel LDP pipe; and

(b) To allocate and divide orders for the purchase of steel LDP pipe among themselves.

58. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

59. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XV

SIXTH CAUSE OF ACTION

(Combination and Conspiracy Involving Concrete Pipe)

60. Beginning in or prior to the year 1954 and continuing thereafter until at least August, 1962 and continuing so far as plaintiff and the other public end users know to the date of the filing of this complaint the defendants American, United, Utah Pipe and White and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in concrete pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

61. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of concrete pipe;

(b) To allocate and divide orders for the purchase of concrete pipe among themselves; and

(c) To refrain from competing in the manufacture of certain sizes and types of concrete pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

62. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among others, the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

63. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XVI
PRAYER FOR RELIEF

WHEREFORE, plaintiff prays as follows:

(1) That the alleged combination and conspiracy among the defendants be adjudged and decreed to be an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act; and

(2) That the plaintiff have and recover from the defendants a judgment for treble the amount of the damages as will be shown by proof under its first cause of action; or

(3) That plaintiff have and recover from defendants judgments for treble the amount of its damages as will be shown by proof under each of its alternative causes of action; and

(4) That plaintiff have an injunctive decree forbidding the further employment against its interests of those conspiratorial tactics hereinabove set forth; and

(5) That each member of the class being composed of those public end users who have purchased the hereinabove defined types of pipe from the defendants, co-conspirators and others directly or indirectly be allowed to intervene in this action either before or after judgment for the purpose of proving the amount of damages suffered by it and recovering three-fold the same, together with its litigation expenses and a reasonable attorney's fee; and

(6) That the plaintiff be awarded its litigation expenses and a reasonable attorney's fee as required by Section 4 of the Clayton Act (15 U.S.C. § 15); and

(7) That plaintiff have such other and further relief as the court shall deem just and proper.

Dated this 13th day of May, 1969.

VERNON B. ROMNEY
Attorney General State of Utah
/s/ Vernon B. Romney

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Gerald R. Miller
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Plaintiff herein respectfully demands a jury, pursuant to Rule 38 (b) of the Federal Rules of Civil Procedure.

Filed May 13, 1969.

Motion for Order That This Action Shall Not Be Maintained as a Class Action.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. 69-1964-HP.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure and the Order of this Court dated July 17, 1969, the undersigned defendants move the Court for its order determining that this action shall not be maintained as a class action.

This motion is made upon the grounds that the action is not a class action within the meaning of Rule 23, Federal Rules of Civil Procedure, that the prerequisites to a class action prescribed by Rule 23(a) and (b) are not present in the action and that a class action is inferior to other available methods for the fair and efficient adjudication of the action. This motion is based upon the Affidavit of Jesse R. O'Malley, and Memorandum of Points and Authorities attached hereto, and all pleadings, papers, documents and other Exhibits which are on file in this cause of action at the time this motion comes on for hearing.

DATED: November 14, 1969.

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By /s/ Jesse R. O'Malley
JESSE R. O'MALLEY

Findings of Fact and Order Respecting Class Action.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. 69-1964-MP.

Defendants herein having moved for an order of this Court determining this action shall not be maintained as a class action, and the same having come on for hearing on December 1, 1969, and plaintiffs and defendants having adduced evidence with respect thereto and the Court being fully advised in the premises, finds as follows:

1. Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, have heretofore commenced actions on their own behalf. Between August 1964 and April 1966, over 100 separate actions allegedly arising out of this same "Western Pipe Conspiracy" were filed in eight different United States District Courts of the Ninth Circuit. In three actions members of an alleged class in those actions purported to represent the same broad class of "public end-users" which plaintiffs herein claim to represent, and in another action, the State of California claimed to represent all of the public end-users within said State. All the aforesaid actions and resulting settlements were widely publicized and potential plaintiffs, throughout the "Western Area," should have had notice thereof prior to the termination, during 1967, 1968 and 1969, of said actions.

2. The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impracticable.

3. A class action has heretofore been shown to be inferior to other available methods for the fair and efficient adjudication of the instant controversy, and the Court so finds in accordance therewith.

NOW, THEREFORE, IT IS ORDERED, that the action herein may not be maintained as a class action and, no parties having joined therein, the class action, alleged in the Complaint herein, in all respects stands terminated as of May 13, 1969, the date of the filing of the Complaint herein.

DATED: Dec. 3, 1969.

/s/ Martin Pence
United States District Court Judge

Filed December 4, 1969.
[Endorsement omitted in printing]

Entered December 4, 1969.
[Endorsement omitted in printing]
[Certification omitted in printing]

Decision on Defendants' Motion Opposing Class Action.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Civil No. 69-1964-MP.

On May 13, 1969, the State of Utah filed this "western pipe" Sherman § 1 antitrust action against certain concrete and steel pipe manufacturing companies, seeking treble damages and injunctive relief on its own behalf and in addition, claimed to represent a class described as (1) "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from the defendants, coconspirators and others"[1] and (2) those states in the Western Area which have not previously filed a similar action.[2]

Defendants have moved for an order that the action not be maintained as a class action.

Plaintiff denominated "those states in the Western Area" as being the states of "Wyoming, Nevada and Idaho", and includes along with them the public bodies and agencies of the states and local governments in those several states and Utah who are end users of pipe acquired from the defendants, etc. Appended to plaintiff's memorandum in support of its class action allegations is a list of what this court can only deter-

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[1]Complaint, para. 1, pp. 1-2.
[2]Complaint, para. 2, p. 2.

mine to be every incorporated whistle-stop, hamlet, village, town, city, county, and water and sewer improvement district in Utah, Nevada, Wyoming and Idaho. The several collections of whistle-stops, etc., total some 300 for Utah, 240 for Idaho, 270 for Wyoming, and 31 for Nevada.[8] Plaintiff did not represent that each was actually an end user of pipe—plaintiff just made a list.

As indicated in the chronological history of the western pipe cases set forth in this court's decision of August 1, 1969, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969), the government's criminal complaint against some of the defendants named in the instant action was filed on March 10, 1964, and on June 23, 1964, the government's civil actions were started.

As this court held in *Maricopa*, the government's criminal and civil actions tolled the statute of limitations until May 24, 1969. Beginning in August 1964, Clayton § 4 treble damage antitrust actions were thereafter filed by the states of Hawaii, California, Oregon, Washington and Arizona against American Pipe and Construction Company, United Concrete Pipe Corp., U.S. Steel, Kaiser Steel, Smith-Scott, Inc., and U.S. Industries, all defendants herein, as well as other defendants, charging exactly the same general antitrust conspiracies, etc., as set forth in the *Utah* complaint. In each of the complaints of the states of Hawaii, California, Oregon and Washington, and of the United

[8]The Nevada list includes the City of Las Vegas, which on January 9, 1968, filed its own private western pipe antitrust civil action in No. 1107-LV, District of Nevada, against American Pipe and Construction Company, Martin-Marietta Corp., and United Concrete Pipe Co., and concluded the same by way of settlement on November 20, 1968.

States, as well as in three other of the 100 separate end user actions filed "in the Western Area", these actions were denominated "class actions" under the old (pre 1966) Rule 23, F. R. Civ. P. This court, treating them as spurious class actions, permitted intervention by all aggrieved public bodies of those several states and gave ample time for joinder. The sum total of the actual parties joining in the class actions, in those four states, plus the state and other public bodies in Arizona, as well as the City of Las Vegas, Nevada, and other private end user actions, totaled some 350 plaintiffs. All of the parties involved in the "class actions" have settled their claims and the actions have been dismissed. The United States Government has also settled its end user claims arising out of the "western pipe" conspiracy, as have all other but some one-half dozen late, late filing individual claimants.

Massive discovery, with depositions in depth of the knowledgeable employees of the major conspirators, together with centralized deposit of thousands of documents relative to the underlying alleged conspiracy, is long since ended. The publicity regarding the suits —covering interim rulings by this court over the past five years, published in CCH Trade Regulation Reports, BNA Law Week, and West's Federal Supplement, together with newspaper publicity anent filing of suits and settlement sums received by public bodies, has been spread throughout the western states during the past five years.

The court will take judicial notice that in November of 1968 at the conference of the National Association of State Purchasing Agents, held in Honolulu, representatives of the State Purchasing Agents of Nevada and Utah were present when this judge delivered an

address covering in depth some of the problems of antitrust litigation in the western pipe cases. This court will also take judicial notice that Lewis Markus, Chief, Economic Section, Antitrust Division, United States Department of Justice, has been, as he himself admits, "somewhat of a fixture on the program of each of the Association's annual meetings since about 1961," and has reported to the state purchasing agents on problems of identical bidding and significant antitrust cases brought in each preceding year. The court will also take judicial notice that there is a National Association of Attorneys General which holds annual conventions. The court will also take judicial notice that each of the public bodies who joined in the western pipe litigation actions above indicated, had its own private attorney, although the litigation was headed up in almost every instance through the states' attorneys general. In those cases, as in this, in most instances, private antitrust counsel was employed to assist the states.[4]

It is with the above background that the court here approaches the threshold problem facing every court

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[4]The instant problem was argued on December 1, 1969. On that morning, an Assistant Attorney General for the State of Idaho filed an affidavit (its first and only) in support of the class action, in which the following appears:

> "The Attorney General of the State of Idaho has heretofore relied exclusively upon Special Assistant Attorneys General appointed from private law firms to represent the state in antitrust matters. Prior to May 13, 1969, the Special Assistant Attorney General informed ROBERT M. ROBSON that the State of Idaho did not sustain sufficient damage as a result of the alleged violations in the above entitled matter to warrant the expense involved in instituting an independent action on behalf of the State of Idaho. Relying upon this advice, the Idaho Attorney General did not file a complaint against the above named Defendants.
>
> "Information subsequently came to the attention of the Idaho Attorney General that . . . Utah had filed . . . suit. . . ."

in all Rule 23(b)(3), F. R. Civ. P., problems, viz.: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." F. R. Civ. P., Rule 23(c)(1).

The complaint, on its face (even though its allegations but barely escape violating the minimum requirements of Rule 23(b), in that it barely goes beyond repetition of the language of the Rule, see *Gillibeau v. City of Richmond, et al.*, Ninth Circuit No. 23,026 (decided October 13, 1969)), when considered with the list of some 800 inferentially potential plaintiffs referred to above, would appear, superficially, to meet the first prerequisite under Rule 23(a), viz., that the class is so numerous that joinder of all members is impracticable—but more of that hereafter. The allegations that there are questions of law and fact common to the claims, likewise would appear to have some merit even though, as this court would judicially notice, from its five-year experience dealing with this same western pipe problem, that some threads of a common "western pipe" conspiracy involving some of here named defendants have been found in each of the states and localities involved in the actions heretofore filed. Also the court would notice that the parties involved in the alleged conspiracy shifted from not only state to state but locality to locality, as did the effect of the conspiratorial acts upon prices. The court notes, for example, that the Utah Concrete Pipe Company and the W. R. White Company, defendants herein, have never been named in any other complaint heretofore filed in the western pipe end user cases and that in their moving papers in the instant class action problem they allege that they have not operated outside

of the state of Utah. An inference to be drawn from the above, of course, would be that other parties defendants might well have to be joined in the other three states affected by the alleged class action. Even if this occurred, however, the court would recognize that there would probably be questions of law and fact common to the "class" claims insofar as the underlying alleged conspiracy of the defendants named herein other than White and Utah Concrete. Thus, on its face, the complaint would apparently meet the second prerequisite of Rule 23(a).

Moreover, the claims of the state of Utah for injury and damages resulting from the alleged conspiracy would probably be generally typical of the claims of the states of Idaho, Wyoming and Nevada, but this court's past experience in the "western pipe" cases has shown that the percentage of artificial price increase, resulting from absence of meaningful competition and stemming from the alleged conspiracy, has varied from locality to locality, not only between states but between localities within the several states. While this might nevertheless meet the prerequisites of Rule 23(a)(3), it would create a question as to whether or not the representative party could adequately protect the interest of the several members of the class. This inner conflict was heretofore illustrated by the difference between Washington Public Power Supply System claims, as contrasted with those of the State of Washington,[5] wherein the State of Washington settled out and the Washington Public Power went to trial on its separate

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[5] *Washington Public Power Supply System v. American Pipe and Construction Co., et al.*, Civil No. 6568, W.D.Wash.; *State of Washington, et al. v. American Pipe and Construction Co., et al.*, Civil No. 3157, W.D.Wash.

and independent theory of damages. But perhaps this too might not be fatal to the plaintiffs' class action.

What *is* fatal to plaintiffs' class action allegations are the raw facts of the past five years litigation on almost precisely the same facts and problems of law set forth in plaintiffs' complaint, and this prior litigation is a criteria which this court must consider in resolving the "threshold problem." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2 Cir., 1968).

At the time the various "class actions" were heretofore filed in the various states, as previously indicated they were "spurious class actions", thereby necessitating joinder. Suit and complaint notice was given to public bodies throughout the states of Hawaii, California, Oregon and Washington by the several attorneys general to all potential plaintiffs in those several states. The end result of such notices was that thereafter there was a joinder of all public bodies which had claims against the several "western pipe" defendants. This court had no difficulty whatsoever in handling the conjoined problems of members of the so-called classes.

Therefore, although here plaintiffs have alleged that the class is so numerous that joinder of all the 800 listed potential members is impracticable, this court cannot accept that numerical list as in any way truly representative of the number of public bodies in the several states who were actually affected by the alleged conspiracy—nor is it so alleged! Based upon population and population expansion in those states over the past twenty years, the court could take judicial notice that the number of end users in Hawaii, Arizona, California, Washington and Oregon should at least be

more than seven times as many as the total number of end users in the four states named in the present "class." In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy could not possibly exceed the 350 cases heretofore filed by end users in the other states of the "Western Area." From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful.[6] To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b)(3).

The court therefore finds that the first prerequisites to a class action have not and cannot here be met. Defendants' motion that this action not be maintained as a class action is GRANTED.

This court cannot pass by, without commenting thereon, the statement of Gerald R. Miller, counsel for plaintiffs, set forth in his affidavit in support of class action, page 2:

> "*If they had thought the law to be otherwise, the Attorney General in his official capacity would certainly have urged each of these govern-*

[6]Notes of the Advisory Committee, 39 FRD 75, 102-03 (1966).

> *mental entities to file an individual action.* It was determined, however, that such a procedure would do little more than complicate this action with a multitude of individual plaintiffs, each seeking a similar relief based upon a common violation of the law." (Emphasis added.)

The court notes from plaintiff's affidavits that the Attorney General of the State of Utah and Attorney Miller sometime in October 1968—over six months before the statute of limitations ran—started a study of the western pipe conspiracy. Any detailed study of the litigation then and theretofore pending in the western pipe cases would have disclosed the facts which this court has above recited. A study of the law on the application of a class action to pipe cases as reflected in *City of New York v. International Pipe & Ceramics Corp.* (44 FRD 584, S.D.N.Y., April 16, 1968) reported in Trade Regulation Reports shortly thereafter, and in Federal Rules Decisions in November 1968, should also have raised a caveat in Utah's determination of the law which might be applied to the present litigation. It should have been unquestioned on the part of the plaintiffs' attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them.

Plaintiffs' attention is also called to *Dolgow v. Anderson,* 43 FRD 472, 484, E.D.N.Y. January 3, 1968 (Weinstein, J.): Alternative devices of "joinder, intervention, consolidation, and the test case"—"presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own in-

terests individually through identical suits or individual decisions about joinder or intervention' [quoting from Frankel in 32 Antitrust L.J. 295, 298 (1966)]." The court feels sure that plaintiffs' counsel would agree that his client, as well as most, if not all, members of the so-called class would properly fall into the group described by Judges Weinstein and Frankel.

DATED: Honolulu, Hawaii, this 11 day of December, 1969.

/s/ Martin Pence
United States District Judge

Filed December 17, 1969.

Motion to Intervene as Plaintiffs.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al. Defendants, Weber Basin Water Conservancy District, et al. Applicants for Intervention. Civil No. 69-1964-MP.

Pursuant to Rule 24(a)(2) or in the alternative Rule 24(b)(2) of the Federal Rules of Civil Procedure, Weber Basin Water Conservancy District, Salt Lake County Water Conservancy District, Salt Lake City Suburban Sanitary District No. 1, Salt Lake City Suburban Sanitary District No. 2, Bountiful Water Subconservancy District, Bona Vista Water Improvement District, Central Weber Sewer Improvement District, Granger-Hunter Improvement District, Metoropolitan Water District of Salt Lake City, Central Davis County Sewer District, North Davis County Sewer District, Ogden River Water Users Association, Sandy Suburban Improvement District, South Davis County Sewer Improvement District, South Davis County Water Improve-

ment District, South Ogden Conservation District, Taylorsville-Bennion Improvement District, Weber-Box Elder Conservation District, Salt Lake County, Box Elder County, Cache County, Emery County, San Juan County, Wasatch County, Salt Lake City, Ogden City, Provo City, City of South Ogden, City of Logan, Cedar City, City of Kaysville, City of Layton, City of Washington Terrace, City of West Jordan, City of Vernal, City of Salem, City of Roy, City of Springville, City of Price, City of Pleasant Grove, City of Payson, City of Oak City, City of North Salt Lake, City of Myton, City of Murray, City of Mt. Pleasant, City of Monticello, Town of Minersville, City of Midvale, City of Manti, City of Lehi, Town of Levan, Town of Huntsville, City of Helper, City of Garland, City of Fillmore, Town of Elwood, Town of East Layton, City of Clearfield, City of Castledale, City of Beaver, City of Nephi, Town of West Point, and City of Blanding, and each of them, jointly and severally, move for leave to intervene as plaintiffs in this action in order to assert the claims set forth in the proposed complaint, of which a copy is hereto attached, on the following grounds:

1. The applicants claim interests relating to the transaction which is the subject of the above-entitled action, and they are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect their intersts.

2. Applicants' claims as set forth in their proposed complaint arise out of the main action in the above-entitled case and have questions of law and fact in common.

3. Granting this motion for intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

4. Applicants are end users of the pipe described in the complaint of plaintiff State of Utah and have purchased substantial amounts of said pipe during the periods described in said complaint. The amount of said pipe purchased by applicants aggregates in excess of $20,000,000. Applicants are members of the class which the State of Utah has sought to represent in the above-entitled action and which was defined in the complaint of the State of Utah to include public bodies, political subdivisions and districts of the State of Utah who are end users of pipe acquired from the defendants, co-conspirators and others. As members of said class, applicants would have relied upon the State of Utah to represent their interests in this action; however, the Court's Findings of Fact and Order Respecting Class Action which was entered on December 4, 1969 makes it mandatory for applicants to seek to intervene in order to protect their interests.

5. As members of the class alleged by the State of Utah in its complaint, applicants have inchoate interests in this action.

6. Unless applicants are allowed to intervene in this action, they may have no other means available by which to present their claims to a court.

Dated this 11th day of December, 1969.

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Salt Lake City, Utah 84111

Attachment to Motion to Intervene as Plaintiff Intervenors' Complaint [Proposed]. (Jury Demanded).

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

Intervenors, and each of them, by their attorneys, intervene in this civil action on their own behalf to secure treble the amount of damages suffered by each of them due to the defendants' violations of the antitrust laws of the United States. Intervenors demand a trial by jury and allege as follows:

FIRST CAUSE OF ACTION

I

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of this Court is invoked under the provisions of Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended, (15 U.S.C. § 15), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages for injuries to their business or property which the intervenors have sustained due to violations by the defendants of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, (15 U.S.C. § 1), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

2. The complaint of the plaintiff State of Utah was filed on May 13, 1969 in the District of Utah. Each corporate defendant maintains an office, transacts busi-

ness, is found, resides, or has an agent in the District of Utah, and each of said corporate defendants was within the jurisdiction of that court for the purpose of service. Each of the defendants in this case was served and has entered appearance through counsel.

3. The interstate trade and commerce described herein is carried on in part within the District of Utah. Many of the unlawful acts done pursuant to the combination and conspiracy herafter alleged have been performed within the District of Utah.

4. This Court has jurisdiction of the above-entitled matter for coordinated or consolidated pretrial proceedings pursuant to the order of the Judicial Panel on Multidistrict Litigation which was entered on August 28, 1969.

II

DEFINITIONS

5. As used herein the term:

(a) "Steel small diameter pressure pipe" (herein referred to as "steel SDP pipe") means thin-walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch.

(b) "Alternate small diameter pressure pipe" (herein referred to as "alternate SDP pipe) means small diameter pressure pipe (herein referred to as "SDP pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete SDP or steel SDP pipe.

(c) "Steel large diameter pressure pipe" (herein referred to as "steel LDP pipe") means heavy-walled

welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch.

(d) "Alternate large diameter pressure pipe" (herein referred to as "alternate LDP pipe") refers to large diameter pressure pipe (herein referred to as "LDP pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete LDP pipe or steel LDP pipe. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated with concrete.

(e) "Concrete pipe" means pipe constructed of concrete either with or without metal components as hereinafter defined to convey water and sewage and includes both pressure and nonpressure pipe.

(f) "Metal components" refers to the steel plates, sheets, skelp, rods, wire and/or mesh used in the manufacture of concrete pipe and to the steel plate and sheets used in the manufacture of steel SDP and LDP pipe.

(g) "Western Area" refers to the states of California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii.

(h) "Public end users" means the State of Utah and its political subdivisions and districts who, as consumers, purchase and install or have installed any of the types of pipe above defined in systems primarily for the conveyance of drinking water and sewage under pressure and for drainage, irrigation, flood control and similar purposes.

III
DESCRIPTION OF THE PARTIES

6. Plaintiff, the State of Utah, through its departments, divisions, agencies, institutions, universities and colleges, is an end user of the types of pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

7. Intervenors are political subdivisions of the State of Utah, including counties, cities and municipalities, and also including districts comprising public entities organized under the laws of Utah, including sewer and water districts. Each of the intervenors are end users of the pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

8. The intervenors own, construct, alter, maintain and operate water and sewage projects, highways and other facilities for the rendering of public services and by means of awarding public construction contracts, acquire materials and services including pipe as defined herein.

9. Defendants:

(a) Defendant American Pipe and Construction Company (hereinafter called "American") is a corporation existing under the laws of the State of California with its principal place of business in Monterey Park, California. American is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(b) Defendant United Concrete Pipe Corporation (hereinafter called "United") is a corporation organ-

ized and existing under the laws of the State of California with its principal place of business in Baldwin Park, California. United is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(c) Defendant Utah Concrete Pipe Company (hereinafter called "Utah Pipe") is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Ogden, Utah. Utah Pipe is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(d) Defendant W. R. White Company (hereinafter called "White") is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Ogden, Utah. White is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(e) Defendant United States Steel Corporation (hereinafter called "U.S. Steel") is a New Jersey corporation which in 1948 acquired the Consolidated Western Steel Corporation, which during the period of the conspiracy herein alleged it operated as a division of U.S. Steel. During this time U.S. Steel, among other things, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(f) Defendant Kaiser Steel Corporation (hereinafter called "Kaiser") is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Oakland, California. Kaiser was, during the period of time covered by this complaint, engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(g) Defendant Smith-Scott, Inc. (hereinafter called "Smith-Scott") is a corporation organized and existing under the laws of the State of California, with its principal place of business in Riverside, California. Smith-Scott, among other things, is engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(h) Defendant U.S. Industries, Inc. (hereinafter called "U.S.I.") is a Delaware corporation which in 1955 purchased the assets of Southern Pipe and Casing, which during the period of the conspiracy herein alleged, it operated as the Tubular Products Division of U.S.I. with offices in Azusa, California. During the period of the conspiracy herein alleged, U.S.I, through its Tubular Products Division, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

10. Martin-Marietta Corporation (hereinafter called "Martin-Marietta") and various other corporations, partnerships and individuals engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined

herein to customers within the Western Area, are named as co-conspirators herein. Each of them participated with defendants and with other co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

IV

NATURE OF TRADE AND COMMERCE

11. The defendants Smith-Scott, U.S.I. and U.S. Steel are the principal manufacturers of steel SDP pipe in the Western Area. Total sales of steel SDP pipe by these defendants during the period May, 1958 through January, 1962 averaged at least $13,500,000 annually.

12. Defendants American, Smith-Scott, U.S.I., U.S. Steel and United are the principal manufacturers of alternate SDP pipe in the Western Area. Total sales of alternate SDP pipe by these defendants during the period 1957 through 1961 inclusive averaged approximately $18,000,000 annually.

13. The defendants American, Kaiser, United and U.S. Steel are the principal manufacturers of alternate LDP pipe in the Western Area. Total sales of alternate LDP pipe by these defendants during the period 1958 through 1961 inclusive averaged at least $15,000,000 annually.

14. The defendants Kaiser and U.S. Steel are the principal manufacturers of steel LDP pipe in the Western Area. Total sales of steel LDP pipe by these defendants during the period 1958 through 1961 inclusive, averaged at least $7,000,000 annually.

15. The defendants American and United are the principal manufacturers of concrete pipe in the Western Area. Total sales of concrete pipe by these defendants

during the period 1958 through 1961 inclusive averaged at least $41,500,000 annually.

16. The defendants Utah Pipe and White are manufacturers and vendors of some of the types of concrete pipe defined in this complaint. During the period of the conspiracy alleged herein said defendants were significant market factors in at least Utah, a part of the Western Area.

17. The co-conspirator Martin-Marietta is a manufacturer and vendor of concrete pipe of the types defined in this complaint. During the period of the conspiracy alleged herein Martin-Marietta was a significant market factor in the Western Area.

18. The construction of systems utilizing the types of pipe herein defined is customarily contracted for by the public end user with general contractors on the basis of competitive bids. Where it is appropriate and desired by the end user, the end user drafts or has drafted specifications allowing the use of steel LDP or SDP, concrete or either steel or concrete LDP or SDP pipe in the alternative.

19. Prior to submitting bids to the end user, the general contractor usually solicits quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where it is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with the pipe manufacturer for the purchase of said pipe and usually on the basis of competitive bidding.

20. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated

with concrete. When the steel LDP pipe manufacturers plan to submit bids or quotations or an alternate LDP pipe job, they in turn solicit quotations or bids from the concrete LDP pipe manufacturers for the performance of this service. The cost of this service is then incorporated in the quotation or bid submitted to the general contractors or end users by the steel LDP pipe manufacturer.

21. Because of the relatively limited number of manufacturers of the type of pipe defined in this complaint, general contractors and end users frequently solicit quotations and bids from manufacturers outside the state where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipeline and deliver or have delivered said pipe directly to the trench site or as near as possible to the place where it will be installed. During the period of the conspiracies herein alleged, the defendants herein have manufactured substantial quantities of the types of pipe herein defined at their plants within the Western Area and elsewhere, and in response to solicitations calling for bids on the types of pipe herein defined have sold, shipped and delivered said pipe to job sites outside the state where it was manufactured. Numerous of these job sites were and are situated within the State of Utah, thus the types of pipe herein defined move in a continuous and uninterrupted flow from the place of manufacture, including the plants of the defendants herein to points of installation outside the state where said pipe was manufactured.

22. Steel SDP pipe and steel LDP pipe are fabricated largely from steel sheet and plate. Most concrete pipe is manufactured with metal components to strengthen the pipe, and particularly with respect to concrete pressure pipe to make it watertight. The defendant manufacturers purchase or produce said steel plate or metal components in anticipation of orders for or to enable them to fill existing orders for the types of pipe herein defined, except nonreinforced concrete pipe. Substantial quantities of the steel plate or metal components which the defendants use in manufacturing the types of pipe herein defined, except nonreinforced concrete pipe, are produced outside the state where said pipe is manufactured. The movement in interstate commerce of the steel plate and metal components is necessary to the manufacture and sale of said pipe by the defendants in the Western Area, and the defendants and co-conspirators are conduits through which said steel plate and metal components flow in a continuous and uninterrupted stream in interstate commerce from the place where said steel plate or metal components are produced to the place within the Western Area where they are fabricated into the types of pipe herein defined and on to the installation site.

23. Any restraint upon free competition in the production or sale of the types of pipe herein defined in the Western Area necessarily and directly affects the interstate flow of said pipe and the interstate flow of the sheet and steel plate and the metal components utilized in the manufacture of all of said types of pipe, except nonreinforced concrete pipe.

V

OFFENSES CHARGED

24. Beginning prior to the year 1954 in the case of concrete pipe and prior to the year 1958 in the case of steel pipe and probably as far back as 1946 in both cases and continuing so far as intervenors know to the date of the filing of this complaint, the defendants and co-conspirators engaged in an unlawful combination and conspiracy to eliminate competition and stabilize and maintain the prices of the herein defined types of pipe, thereby restraining the hereinabove described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

25. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among and between the defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations in response to solicitations calling for bids and quotes for the herein defined types of pipe.

(b) To allocate and divide orders for the purchase of the herein defined types of pipe among themselves.

(c) To refrain from competing in the manufacture of certain sizes and types of pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

26. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following:

(a) Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among themselves according to agreed upon percentages.

(b) At such meetings and in subsequent communications by telephone and other interstate communication media, the defendants and co-conspirators agreed between and among themselves as to which manufacturer would submit the low bid and what that bid would be and which manufacturers would refrain from bidding or would submit higher complementary bids not intended to win awards and what those bids would be.

(c) At such meetings and at subsequent meetings, defendants and co-conspirators would agree in certain instances as to the types and sizes of pipe each would manufacture and market in certain geographical areas included in the Western Area.

VI

EFFECTS OF THE CONSPIRACY

27. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among defendants and co-conspirators has been restricted and suppressed.

(b) General contractors and end users were deprived of the right to receive competitive bids and quotes for the types of pipe herein defined and were deceived into believing that collusive and noncompetitive bids and quotes were competitive.

(c) Public end users and others engaged in the conveyance and distribution of water and sewage have been denied the right to receive competitive sealed bids

as required by law or practice or have been denied a competitive market in connection with their purchases and have been forced to pay high, artificially fixed prices for the types of pipe herein defined.

(d) The cost of the types of pipe herein defined has been arbitrarily increased, fixed and maintained.

(e) The business and property of intervenors, as intended by the defendants and co-conspirators, were injured in that they were compelled to pay higher prices for the types of pipe herein defined than they would have had to pay had it not been for the aforementioned combination and conspiracy.

VII
TOLLING OF THE STATUTE OF LIMITATIONS

28. Intervenors did not discover said combination and conspiracy until the year 1969. Intervenors had no knowledge of the said combination and conspiracy or of any facts which might have led to the discovery thereof until after March 10, 1964, when a United States Grand Jury sitting in the Southern District of California, Central Division, returned indictments numbered 33338-42 inclusive, setting out in large part the combinations and conspiracies herein alleged. Intervenors could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants and co-conspirators through their adoption of elaborate schemes for submitting sham and collusive bids which misrepresented the independence and competitiveness thereof and their resort to secrecy to avoid detection as hereinabove alleged.

29. Since March 10, 1964 and continuing through and one year from the date of the entering of a Consent Decree against the last remaining defendant in a government case, said Consent Decree having been entered on May 24, 1968, the running of the statute of limitations has been suspended by reason of 15 U.S.C. § 16 (b), commonly referred to as § 5 (b) of the Clayton Act because of the pendency of actions instituted by the United States of America. This complaint is based in part upon matters alleged in those government actions.

30. The defendants Utah Pipe and White were neither defendants in the government actions nor named co-conspirators. As to those defendants, intervenors have no knowledge of the said combination and conspiracy or any facts which might have led to the discovery thereof prior to at least the year 1969. Intervenors could not have uncovered the conspiracy as to these defendants at an earlier date by the exercise of due diligence inasmuch as said defendants and other co-conspirators acted together and individually by agreement to conceal the existence of said combination and conspiracy and the acts performed in furtherance thereof. Their adoption of schemes for submitting sham and collusive bids and quotations which misrepresented the independence and competitiveness thereof is but one manifestation of their resort to secrecy.

31. Intervenors are members of the class which the State of Utah seeks to represent in the above entitled action and which was defined in the complaint of the State of Utah to include public bodies and agencies of state and local government in the state of Utah who are end users of pipe acquired from the defendants, co-conspirators and others. As members of said class In-

tervenors would have relied upon the State of Utah to represent their interests in this action, however, the Court's order entered on December 4, 1969 terminating the class action makes it mandatory for intervenors to intervene in this matter in order to protect their interests.

VIII
INJURY TO INTERVENORS

32. Since at least 1946 intervenors have acquired substantial quantities of the types of pipe herein defined which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe intervenors have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

33. When acquiring said pipe directly from manufacturers intervenors have been led and induced by the defendants and co-conspirators, as a result of the illegal combination and conspiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy, and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

34. When acquiring said pipe through prime contractors, intervenors have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by the defendants' and co-conspirators' il-

legal combination and conspiracy, and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

35. As a result of the alleged illegal combination and conspiracy, intervenors have been injured and financially damaged by the defendants in an amount which is presently undetermined. Intervenors specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

IX

ADDITIONAL CAUSES OF ACTION ALTERNATIVE TO THE ABOVE FIRST CAUSE OF ACTION

36. As additional causes of action alternative to the above first cause of action intervenors allege that commencing at least as early as the year 1954 and continuing until at least 1962, the exact dates being unknown to intervenors, the defendants and co-conspirators engaged in a continuing course of conduct which consisted of a series of combinations, conspiracies and agreements in restraint of the aforesaid interstate trade and commerce in the types of pipe herein defined. These combinations, conspiracies and agreements are described in the following alternative causes of action. Intervenors

herein allege and incorporate by reference in each of the alternative causes of action as fully as though there separately set out, Paragraphs I through IV, Paragraph VI and Paragraph VII.

X

SECOND CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Small Diameter Pressure Pipe)

37. Beginning at least as early as May, 1958 and continuing thereafter until at least January, 1962, the exact dates being unknown to intervenors, the defendants U.S. Steel, U.S.I. and Smith-Scott and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinabove described interstate trade and commerce in steel SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

38. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations for the sale of steel SDP pipe; and

(b) To allocate and divide orders for the purchase of SDP pipe among themselves.

39. For the purpose of forming and effectuating and as a part of the aforesaid combination and conspiracy, said defendants did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meeting and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

40. The aforesaid combination and conspiracy in restraint of the interstate trade and commerce in the types of pipe covered by this paragraph of the complaint was carried out in the manner and with the effects described in Paragraphs VI and VII.

41. Since at least 1946 intervenors have acquired substantial quantities of the type of pipe covered in this paragraph of the complaint which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe, intervenors have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

42. When acquiring said pipe directly from manufacturers, intervenors have been led and induced by the defendants and co-conspirators as a result of the illegal combination and conspiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the

operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

43. When acquiring said pipe through prime contractors, intervenors have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by said defendants' and co-conspirators' illegal combination and conspiracy, and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

44. As a result of the alleged illegal combination and conspiracy, intervenors have been injured and financially damaged by the defendants in an amount which is presently undetermined. Intervenors specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

XI
THIRD CAUSE OF ACTION
(Combination and Conspiracy Involving Alternate Small Diameter Pressure Pipe)

45. Beginning sometime prior to 1955 and continuing thereafter until at least January, 1962, the exact dates being unknown to intervenors, the defendants U.S. Steel, Smith-Scott, U.S.I., American and United and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

46. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide alternate SDP pipe jobs so that the manufacturers of steel SDP pipe considered as a group on the one hand and the manufacturers of concrete SDP pipe considered together on the other hand would each obtain an agreed upon percent of all alternate SDP pipe jobs.

47. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things, which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel SDP pipe manufacturer or a concrete SDP pipe manufacturer obtained each job. Information

needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

48. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XII

FOURTH CAUSE OF ACTION

(Combination and Conspiracy Involving Alternate Large Diameter Pressure Pipe)

49. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to intervenors, the defendants American, Kaiser, United and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate LDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

50. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide solicitations for alternate LDP pipe so that the manufacturers of steel LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations and the manufacturers of concrete LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations, the amount of business involved in the lining and coating of the steel LDP pipe by the concrete LDP pipe manufacturers being included in the share to be obtained by the concrete LDP pipe manufacturers.

51. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel LDP pipe manufacturer or a concrete LDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

52. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XIII

FIFTH CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Large Diameter Pressure Pipe)

53. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to intervenors, the defendants Kaiser and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in steel LDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

54. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of steel LDP pipe; and

(b) To allocate and divide orders for the purchase of steel LDP pipe among themselves.

55. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

56. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XIV

SIXTH CAUSE OF ACTION

(Combination and Conspiracy Involving Concrete Pipe)

57. Beginning in or prior to the year 1954 and continuing thereafter until at least August, 1962 and continuing so far as intervenors know to the date of the filing of this complaint the defendants American, United, Utah Pipe and White and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in concrete pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

58. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of concrete pipe;

(b) To allocate and divide orders for the purchase of concrete pipe among themselves; and

(c) To refrain from competing in the manufacture of certain sizes and types of concrete pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

59. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among others, the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

60. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XV

PRAYER FOR RELIEF

WHEREFORE, intervenors pray as follows:

(1) That the alleged combination and conspiracy among the defendants be adjudged and decreed to be an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act; and

(2) That each of the intervenors have and recover from the defendants judgment for treble the amount of the damages as will be shown by proof under their first cause of action; or

(3) That each of the intervenors have and recover from defendants judgments for treble the amount of their damages as will be shown by proof under each of their alternative causes of action; and

(4) That intervenors have an injunctive decree forbidding the further employment against their interests of those conspiratorial tactics hereinabove set forth; and

(5) That intervenors be awarded their litigation expenses and a reasonable attorneys' fee as required by Section 4 of the Clayton Act (15 U.S.C. § 15); and

(6) That intervenors have such other and further relief as the Court shall deem just and proper.

Dated this 11th day of December, 1969.

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Filed: December 12, 1969.

Motion to Intervene as Plaintiffs.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants, City of Grantsville, et al., Applicants for Intervention. Civil No. 69-1964-MP.

Pursuant to Rule 24(a)(2); or in the alternative Rule 24(b)(2) of the Federal Rules of Civil Procedure, the City of Grantsville, City of Sandy, City of Riverton, Town of Perry, Town of Annabella and Salt Lake County Cottonwood Sanitary District move to intervene in the above-entitled action and hereby adopt and incorporate by reference herein the Motion heretofore filed on December 12, 1969, on behalf of Weber Basin Water Conservancy District; Salt Lake County Water Conservancy District; Salt Lake City Suburban Sanitary District No. 1 and others, together with the pleadings in support of that Motion.

DATED this 29th day of December, 1969.

Richard Fox, Esq.
Counsel for City of Grantsville

Glenn C. Hanni, Esq.
Counsel for City of Riverton

O. Dee Lund, Esq.
Counsel for Town of Perry

Tex Olsen, Esq.
Counsel for Town of Annabella

Fred L. Finlinson, Esq.
Counsel for Salt Lake County Cottonwood
Sanitary District

John B. Anderson, Esq.
Counsel for Sandy City

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill
NESLEN & MOCK
Kent Shearer
/s/ Denis R. Morrill
Special Assistant Attorneys
General State of Utah
Attorneys for Applicants for
Intervention
206 El Paso Natural Gas Building
Salt Lake City, Utah 84111

Filed December 29, 1969.

[Certificate of Mailing omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

FRED L. MONTMORENCY, being first duly sworn, states that he is the Mayor of the City of South Ogden, Utah, a municipal corporation of the State of Utah. From approximately September of 1958 until the year 1968, the City of South Ogden has purchased significant amounts of concrete pipe from one or more of the defendants in the above-entitled action, their co-conspirators or others at a cost including installation of approximately $531,000.00. Affiant estimates the cost of said pipe, exclusive of installation cost, at approximately $235,000.00.

DATED this 9th day of December, 1969.

/s/ Fred L. Montmorency
FRED L. MONTMORENCY

Executed December 9, 1969.

[Notarial Acknowledgment omitted in printing].

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

ROBERT B. HILBERT, being first duly sworn, states that he is Secretary-General Manager of Salt Lake County Water Conservancy District, a public water district organized under the laws of the State of Utah. During the period 1955 through 1964, Salt Lake County Water Conservancy District has purchased approximately 219,000 lineal feet of concrete and steel pipe from one or more of the defendants in the action now pending, State of Utah versus American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., at a cost, exclusive of installation costs, of approximately $1,600,000. During the period 1965 through 1969 Salt Lake County Water Conservancy District has purchased approximately 22,000 lineal feet of pipe at an approximate cost, exclusive of installation cost, of $350,000.

DATED this 9th day of December, 1969.

/s/ Robert B. Hilbert

Executed December 10, 1969.

[Notarial Acknowledgment omitted in printing].

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

JOHN J. WHEELWRIGHT, being first duly sworn, states that he is General Manager of the South Davis County Sewer Improvement District, a sewer district organized under the laws of the State of Utah. During the period 1960 through 1961, South Davis County Sewer Improvement District has purchased pipe of the type described in the complaint of the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost, including installation, of approximately $2,500,000.

/s/ John J. Wheelwright

Executed December 10, 1969.

[Notarial Acknowledgment omitted in printing].

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

JESSE W. HESS, being first duly sworn, deposes and says:

I am the Secretary-Treasurer of the South Davis County Water Improvement District, a body politic organized and existing under the laws of the State of Utah and have held this position since 1955.

That during the period from 1954 through 1962 the South Davis County Water Improvement District purchased pipe as described in the Complaint on file herein from the above named defendants, co-conspirators, or others at a cost of approximately $392,000.00 exclusive of installation charges.

/s/ Jesse W. Hess
Jesse W. Hess, Secretary-Treasurer
South Davis County Water Improvement District

Executed December 11, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

GOLDEN W. STEWART, being first duly sworn, states that he is Manager of Bountiful Water Subconservancy District, a public water district created under the laws of the State of Utah. During the period 1958 through 1963, Bountiful Water Subconservancy District has purchased approximately 416,156 lineal feet of concrete and steel pipe from one or more of the defendants in the action now pending, entitled State of Utah versus American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc. For that pipe Bountiful Water Subconservancy District has paid approximately $1,105,521.00, exclusive of installation costs.

DATED this 15th day of December, 1969

/s/ Golden W. Stewart

Executed December 15, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

WAYNE M. WINEGAR being first duly sworn, states that he is Secretary-Manager of the Weber Basin Water Conservancy District. During the period 1946 through 1964, Weber Basin Water Conservancy District has purchased approximately $1,800,000.00 worth of concrete and steel pipe from one or more of the defendants in the action now pending, State of Utah versus American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation: Smith-Scott, Inc.; U.S. Industries, Inc. for non-Bureau of Reclamation projects. Approximately $9,000,000.00 worth of pipe has been purchased for Bureau of Reclamation projects.

Wayne M. Winegar

Executed December 15, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

THERON PALMER, being first duly sworn, states that he is General Manager of the Bona Vista Water District, a water district organized under the laws of the State of Utah. During the period 1957 through 1959, Bona Vista Water District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $450,000, exclusive of installation.

/s/ Theron Palmer

Executed December 16, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

J. ALBERT SMITH being first duly sworn, states he is General Manager of Salt Lake City Suburban Sanitary District No. 2, a sewer district organized under laws of the State of Utah. During the period of 1954 through 1964, said Sewer District purchased pipe of the type described in the complaint in above-entitled action from one or more of the defendants in said action, co-conspirators or others at a cost of approximately $130,256, exclusive of installation.

/s/ J. Albert Smith

Executed December 17, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

CHARLES R. KELLEY, being first duly sworn, states that he is the City Manager of Ogden City, a Municipal Corporation of the State of Utah. During the period of 1946 to 1954, inclusive, Ogden City purchased pipe of the type described in the complaint in the above entitled action from one or more of the defendants named in that action, co-conspirators or others at a cost of approximately $118,464.00, exclusive of installation.

During the period of 1955 through 1964, inclusive, Ogden City purchased pipe of the type described in the complaint in the above entitled action from one or more of the defendants, co-conspirators or others at a cost of approximately $195,930.00, exclusive of installation.

/s/ Charles R. Kelley
CHARLES R. KELLEY, City Manager

Executed December 17, 1969.
[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Edward H. Southwick, being first duly sworn, states that he is General Manager of the Weber-Box Elder Conservation District, a water district organized under the laws of the State of Utah. During the period 1959 through 1964, Weber-Box Elder Conservation District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $300,000, exclusive of installation.

/s/ Edward H. Southwick

Executed December 18, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

R. W. Christiansen, being first duly sworn on his oath deposes and says: That he is the coordinator of Nephi City, a municipal corporation of the State of Utah; that he is the person most familiar with the records of purchases of Nephi City from the defendants, or any one of them, named in the above entitled cause; that the only purchases which at this time can be found from any of the named defendants are from the defendant, Utah Concrete Pipe Company;

That the purchases made by Nephi City Corporation, from said defendant were made and paid for on the following dates with the following warrant numbers and in the following amounts, to-wit:

Name	Date	Warrant No.	Amount
Utah Concrete Pipe Co.	7/18/57	2036	$ 9,692.73
Utah Concrete Pipe Co.	8/8/57	2055	6,563.54
Utah Concrete Pipe Co.	10/17/57	2105	537.60
Utah Concrete Pipe Co.	9/9/64	3732	6,290.05
		Total	$23,083.92

and that the total thereof as above is $23,083.92.

That the foregoing is true and correct to the best of my knowledge, information and belief of the affiant; and that he makes this affidavit for and on behalf of Nephi City, a Municipal Corporation.

/s/ R. W. Christiansen
Affiant

Executed December 22, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

CHARLES F. HULL, being first duly sworn, states that he is Mayor of Roy City, a corporation organized under the laws of the State of Utah. During the period February 1, 1956 through January 11, 1965, Roy City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $103,345.00, exclusive of installation.

/s/ Charles F. Hull
Charles F. Hull, Mayor

Executed December 22, 1969.
[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

HOWARD J. MOODY being first duly sworn, states he is General Manager of Sandy Suburban Improvement District, a sewer district organized under laws of the State of Utah. During the period of 1954 through 1964, said Sewer District purchased pipe of the type described in the complaint in above-entitled action from one or more of the defendants in said action, co-conspirators or others at a cost of approximately $292,-453.23, exclusive of installation.

/s/ Howard J. Moody

Executed December 23, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

L. L. Finlinson, being first duly sworn, states that he is Mayor of Oak City Town Corporation, incorporated under the laws of the State of Utah. During the period 1954 through 1964, Oak City Town Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $991.86, and during the period 1946 through 1954 at a cost of approximately $1,718.48, exclusive of installation.

/s/ L. L. Finlinson

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Jay F. Harmer, being first duly sworn, states that he is Mayor of the Pleasant Grove City Corporation; a municipal corporation organized under the laws of the State of Utah. During the period 1954 through 1964, Pleasant Grove City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $26,500.00, exclusive of installation.

/s/ Jay F. Harmer

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

CLARENCE J. STOKER, being first duly sworn, states that he is the City Manager of Clearfield City, a municipal corporation organized under the laws of the State of Utah. During the period 1956 through 1964 said municipal corporation of the State of Utah purchased pipe of the type described in the complaint in the above-entitled action from one or more of the Defendants in the above-entitled action, co-conspirators or others at a cost of approximately $55,649.63, exclusive of installation.

/s/ Clarence J. Stoker
Clarence J. Stoker

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

FLOYD J. ERICKSON, being first duly sworn, states that he is the District Manager of the North Davis County Sewer District, a Special Improvement District organized under the laws of the State of Utah. During the period 1956 through 1959 said improvement district of the State of Utah purchased pipe of the type described in the complaint in the above-entitled action from one or more of the Defendants in the above-entitled action, co-conspirators or others at a cost of approximately $806,038.00, exclusive of installation.

/s/ Floyd J. Erickson
Floyd J. Erickson

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

David B. Brinton, being first duly sworn, states that he is General Manager of the Salt Lake City Suburban Sanitary District, a sewer district organized under the laws of the State of Utah. During the period 1954 through 1964, Salt Lake City Suburban Sanitary District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, or co-conspirators or others at a cost of approximately $1,153,200.00, exclusive of installation.

/s/ David B. Brinton

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

RANDALL J. HEAPS, being first duly sworn, states that he is the City Recorder of Layton City Corporation, a municipality organized under the laws of the State of Utah. During the period 1959 through 1964, Layton City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, conspirators or others at a cost of approximately $61,883.00, exclusive of installation.

/s/ Randall J. Heaps

Executed December 29, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

DON C. PIERCE, being first duly sworn, states that he is the City Recorder of Salem City Corporation, A Municipality, chartered under the laws of the State of Utah. During the period 1946 through 1964, Salem City Corp. purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $105,000.00, exclusive of installation.

/s/ Don C. Pierce

Executed December 29, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Edward H. Southwick, being first duly sworn, states that he is General Manager of the South Ogden Conservation District, a water district organized under the laws of the State of Utah. During the period 1959 through 1964, South Ogden Conservation District purchased pipe of the type described in the complaint in the above-entitled action, co-conspirators or others at a cost of approximately $140,000, exclusive of installation.

/s/ Edward H. Southwick

Executed December 30, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

J. Bracken Lee, being first duly sworn, states that he is the Mayor of Salt Lake City, a municipal corporation of the State of Utah. During the period 1954 through 1964, Salt Lake City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others, at a cost of approximately $3,350,000, exclusive of installation; and during the period 1946 through 1953, Salt Lake City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others, at a cost of approximately $1,500,000, exclusive of installation.

/s/ J. Bracken Lee
J. Bracken Lee

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

ARNOLD ANDERSON, being first duly sworn, states that he is City Manager of the City of Cedar City, a corporation organized under the laws of the State of Utah. During the period 1952 through 1960, Cedar City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $268,212.00, exclusive of installation.

/s/ ARNOLD E. ANDERSON
Arnold Anderson

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

HENRY BECKSTEAD, being first duly sworn, states that he is Mayor of the City of Midvale, a corporation organized under the laws of the State of Utah. During the period 1954 through 1964, Midvale City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $77,387.87, exclusive of installation.

/s/ HENRY BECKSTEAD
Henry Beckstead

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

JACK A. RICHARDS, being first duly sworn, states as follows:

I am the Ogden City Attorney. I am also counsel for Bona Vista Water Improvement District. On or about February 19, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum. D. Jay Wilson, the Weber County Attorney, was also present at the meeting. Messrs. Miller and Mangum advised us that they had been retained by the State of Utah as Special Assistant Attorneys General in connection with a private treble damage civil antitrust matter involving steel and concrete pipe. The proposed litigation was discussed generally, and I was advised that the State of Utah contemplated a class action on behalf of all of its counties, cities and other governmental entities. The above-entitled action was subsequently filed in the District of Utah, and as the Ogden City Attorney and counsel for Bona Vista Water Improvement District, I relied upon the class action as a means of protecting the interests of the City of Ogden and the Bona Vista Water Improvement District and a procedural vehicle by which their claims could be presented to the Court.

/s/ Jack A. Richards
JACK A. RICHARDS

Executed January 4, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

DAVID B. BRINTON, being first duly sworn, states as follows:

I am General Manager of the Salt Lake City Suburban Sanitary District, a sewer district organized under the laws of the State of Utah. During 1969, I had occasion to discuss the above-entitled case with Gerald R. Miller. He advised me that he had been retained by the State of Utah as a Special Assistant Attorney General to prosecute a private treble damage civil antitrust action involving concrete and steel pipe. In view of the substantial purchases of pipe made by the Salt Lake City Suburban Sanitary District between the years 1954 and 1964, I was, of course, interested in this matter. Accordingly, I made some effort to keep advised as to developments in this case. The Salt Lake City Suburban Sanitary District was relying on the class action which was brought by the State of Utah as a procedural vehicle through which it could present its claims to the Court. Upon receiving notice of the Court's ruling in regard to the class action, the Salt Lake City Suburban Sanitary District promptly authorized the Attorney General of the State of Utah and the attorneys previously retained by him to represent its interest as a named party.

/s/ David B. Brinton
DAVID B. BRINTON

Executed January 4, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

DOREN B. BOYCE, being first duly sworn, states that he is Manager of the Central Weber Sewer Improvement District, a sewer improvement district organized under the laws of the State of Utah. During the period beginning with the calendar year 1956 and ending with the calendar year of 1966, the Central Weber Sewer Improvement District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $627,000.00, exclusive of installation.

/s/ Doren B. Boyce

Executed January 5, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

RICHARD A. CHAMBERS, being first duly sworn, states that he is Mayor of Logan City, a municipal corporation of the State of Utah. During the period 1947 through 1964, Logan City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $534,874.74, exclusive of installation.

/s/ Richard A. Chambers

Executed January 8, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

JACK L. CRELLIN, being first duly sworn, states as follows:

I am the Salt Lake City Attorney. On or about February 3, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum. At that time they advised me that their firm had been retained and that they had been designated Special Assistant Attorneys General to represent the State of Utah in a treble damage civil antitrust action against certain manufacturers and vendors of concrete and steel pipe. We discussed the contemplated litigation and determined that it would be proper and desirable to file the case as a class action, with the State of Utah representing all members of the class, including Salt Lake City. Subsequently, I have had many conversations with one or more of the attorneys retained by the State of Utah in the above-entitled matter. Most of these conversations were for the purpose of advising Salt Lake City as to the developments in the above-entitled case. I have also assisted the State of Utah in obtaining transaction information from various departments of Salt Lake City. As the Salt Lake City Attorney, I have been aware of the above-entitled case, and I have made an effort to follow its progress. Salt Lake City relied on the class action filed by the State of Utah as the vehicle through which it could present to the Court its claims against these same defendants.

/s/ Jack L. Crellin

JACK L. CRELLIN

Executed January 9, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

NED F. WILSON, being first duly sworn, states that he is the City Recorder of Lehi City Corporation, a municipal corporation organized under the laws of the State of Utah. During the period 1959 through 1963, Lehi City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $44,490.00, exclusive of installation.

/s/ Ned F. Wilson
City Recorder

Executed January 12, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

GORDON B. CHRISTENSON, being first duly sworn, states as follows:

I am the Salt Lake County Attorney. On or about February 4, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum and Kent Shearer of the firm of Neslen & Mock. These gentlemen advised me that they had been retained by the State of Utah to represent the State in connection with a treble damage civil antitrust action involving the purchase of steel and concrete pipe. I was advised that the State of Utah contemplated a class action on behalf of all of its counties, cities and other governmental bodies. Because of the workload in my office and the lack of expertise in antitrust matters, I determined to rely on the class action which would be brought by the Attorney General as the procedural vehicle through which the claims of Salt Lake County could be presented to the Court. Upon receipt of the notice of the Court's ruling in regard to the class action in the above-entitled case, the Salt Lake County Commission promptly authorized the Attorney General and the Special Assistant Attorneys General retained by him to represent Salt Lake County as a named party in this action.

/s/ Gordon B. Christenson
GORDON B. CHRISTENSON

Executed January 12, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

GLENN W. ADAMS, being first duly sworn, states as follows:

I am the lawyer for Central Weber Sewer Improvement District. On or about February 19, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum. They advised me that they had been retained by the Attorney General as Special Assistant Attorneys General to represent the State of Utah in connection with a private treble damage civil antitrust action against certain manufacturers and suppliers of concrete and steel pipe. We discussed this matter generally, and I was advised that the State of Utah intended to bring a class action on behalf of all of its counties, cities and other governmental entities. Following that meeting, I had several other conversations with one or more of the attorneys representing the State of Utah. As counsel for Central Weber Sewer Improvement District, I made an effort to keep advised of the developments in the above-entitled case. On various dates I reported on this matter to the trustees of the Central Weber Sewer Improvement District. That district was relying upon the class action brought by the State of Utah and expected in due time to present its claims to the Court as a member of said class.

/s/ Glenn W. Adams
GLENN W. ADAMS

Executed January 13, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Glenn A. Wright, being first duly sworn, states that he is the duly acting and appointed City Engineer for Provo City Corporation, a municipal corporation of the State of Utah. During the period from 1946 to 1954, inclusive, the City of Provo purchased for use in Provo City steel, concrete or a combination of steel and concrete pipe in the approximate sum of $580,000. During the period from 1955 to 1964, inclusive, an additional amount of pipe in the approximate sum of $470,000, of the type of pipe described in the complaint in the above-entitled action purchased by the Plaintiff from the Defendant in the above entitled action. The figures given are exclusive of installation costs or any costs except the direct purchase price.

/s/ Glenn A. Wright
GLENN A. WRIGHT, CITY ENGINEER

Executed January 15, 1970.
[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Buell Bennett, being first duly sworn, states that he is City Manager of the City of Vernal, a corporation organized under the laws of the State of Utah. The City of Vernal purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others in the following periods for the following amounts:

1946 to 1953—$16,031.38
1954 thru 1964—$272,910.19
1965—$48,626.00

/s/ Buell Bennett
Buell Bennett

Executed January 19, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

J. C. LINFORD, being first duly sworn, states that he is Chairman of the Central Davis County Sewer District, a sewer district organized under the laws of the State of Utah. During the period 1959 through 1964, Central Davis County Sewer District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $317,143.05, exclusive of installation.

/s/ J. C. Linford

Executed January 20, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

T. JOHN LABRUM, having first been duly sworn, upon oath deposes and says:

1. He is the Manager of the Taylorsville-Bennion Improvement District, and has been so since its creation in 1954.

2. That he is familiar with the purchases of the District with regard to pipe and supplies, and has made a study of the concrete and steel pipe of the District purchased since its inception.

3. That since the year 1954 through the year 1964, inclusive, Taylorsville-Bennion Improvement District has purchased pipe, including manholes, of the type described in the complaint from defendants or others, at a cost of $327,175.56, exclusive of installation.

Dated this 20th day of January, 1970.

/s/ T. John Labrum
T. John Labrum

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

ROSCOE W. GODFREY, being first duly sworn, deposes and says: That he is the manager of the Salt Lake County Cottonwood Sanitary District, a special improvement district organized under the laws of the State of Utah; that during the period from 1957 to 1964 the Salt Lake County Cottonwood Sanitary District purchased pipe of the type described in the Complaint in the above entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $3,781,378.24, including the cost of installing said pipe in the Sewer Treatment System of said District.

/s/ Roscoe W. Godfrey

Executed January 23, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

WILLIAM C. HAGUE, being first duly sworn, states:

1. That he is the General Manager of Metropolitan Water District of Salt Lake City, a separate and independent political corporate entity organized and existing pursuant to Chapter 8, Title 73, U. C. A. 1953, being the Metropolitan Water District Act; and

2. That during the period 1946 through 1953, inclusive, the Metropolitan Water District of Salt Lake City purchased pipe of the type described in the Complaint in the above entitled action from one or more of the defendants in the above entitled action, co-conspirators or others at a cost of approximately $1,537,000.00, exclusive of installation; and

3. That during the period 1954 through 1966, inclusive, the Metropolitan Water District of Salt Lake City purchased pipe of the type described in the Complaint in the above entitled action from one or more of the defendants in the above entitled action, co-conspirators or others at a cost of approximately $263,000.00, exclusive of installation; and

4. That prior to the 13th day of May, 1969 he was advised that the State of Utah would commence an action in the appropriate Federal District Court for itself and in behalf if its agencies, political subdivisions and districts, and in particular the Metropolitan Water District of Salt Lake City, to recover the damages it has sustained by reason of the acts and conduct of the defendants herein; and was further advised that the rights of the Metropolitan Water District of Salt Lake City would be thereby protected; and that in reliance thereon he did not cause to be filed a separate action by Metropolitan Water District of Salt Lake City to recover the damages sustained by it herein.

/s/ William C. Hague

Executed January 30, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

JOHN JORGENSEN, being first duly sworn, states that he has been Mayor and Councilman in charge of water for Castle Dale City. During the period 1954 through 1964, and has purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $16,322.70, exclusive of installation.

/s/ John L. Jorgensen

Executed February 13, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

Walter W. Brock, being first duly sworn, states that he is General Manager of the Granger-Hunter Improvement District, a water and sewer district organized under the laws of the State of Utah. During the period 1953 through 1964, Granger-Hunter Improvement District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $702,000, exclusive of installation.

/s/ Walter W. Brock

Executed March 5, 1970.

[Notarial Acknowledgment omitted in printing]

Request for Admission.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

TO: Plaintiff, STATE OF UTAH, and to GERALD R. MILLER, ESQ. and MULLINER, PRINCE & MANGUM, its attorneys.

Pursuant to Rule 36, F.R.C.P., defendant, United States Steel Corporation, requests plaintiff, State of Utah, within ten (10) days after service of this request, to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. The genuineness of the letter of January 2, 1970, from Gerald R. Miller, Counsel for Plaintiff, to Applicants for Intervention, a copy of which is attached hereto as Exhibit A.

DATED: January 22nd, 1970.

DOMINIC B. KING, ESQ.
Law Department
U. S. Steel Corporation
525 William Penn Place
Pittsburgh, Pennsylvania
and
MUSICK, PEELER & GARRETT
Jesse R. O'Malley, Esq.
Lawrence E. Stickney, Esq.
One Wilshire Boulevard,
Los Angeles, California 90017
Attorneys for Defendant,
UNITED STATES STEEL CORPORATION
BY: /s/ Jesse R. O'Malley
JESSE R. O'MALLEY

EXHIBIT A TO REQUEST FOR ADMISSIONS

[Letterhead omitted in printing]

January 2, 1970

Applicants for Intervention
in the State of Utah Private
Treble Damage Civil Antitrust Case
Involving Steel and Concrete Pipe

Re: *State of Utah, et al. v. American Pipe & Constr. Co., et al.*

Gentlemen:

As you may know, this firm, together with Kent Shearer of Neslen & Mock, were retained by the State of Utah to represent it in connection with the private treble damage civil antitrust case referred to above. We thought it would be well to advise you generally as to the nature of this action and its past history.

The Complaint was filed on May 13, 1969 by the State of Utah on behalf of itself and all others similarly situated. The State brought a class action seeking to represent the interests of all of its governmental entities, including cities, counties and water districts. In addition, the class was defined broadly enough to include the states of Idaho, Wyoming and Nevada. The Complaint alleges violations of § 1 of the Sherman Act. It is based in large part upon previous federal proceedings against many of the same defendants.

On March 10, 1964 a United States Grand Jury sitting in the Southern District of California returned indictments against the defendants American Pipe and Construction Company, United Concrete Pipe Corporation, Kaiser Steel Corporation, United States Steel Corporation, U. S. Industries and Smith-Scott, Inc. charg-

ing them and certain of their officers with conspiring to restrain interstate trade in steel and concrete pipe in that they submitted collusive and rigged bids for the sale of such pipe and allocated and divided business among themselves. On June 19, 1964, pleas of *nolo contendere* were made by all defendants, and judgments of guilt were entered. Upon completion of the criminal cases, the federal government filed civil actions against the same corporate defendants. Subsequently, treble damage antitrust actions were filed by more than 350 plaintiffs, including the states of Hawaii, California, Oregon, Washington and Arizona. Eventually, these cases were consolidated before the Honorable Martin Pence, United States District Judge for the District of Hawaii. This litigation came to be known as the "Western pipe conspiracy cases". Most of the parties involved in the West Coast cases have settled their claims, and their actions have been dismissed. The United States government settled as to each defendant except American on December 8, 1967. A consent judgment was entered against American on May 24, 1968. There are presently some half dozen cases pending before Judge Pence, including the State of Utah case referred to above.

By an order filed December 4, 1969, Judge Pence held that the State of Utah's action could not be maintained as a class action. Following that ruling and by notice dated December 4, 1969, the Attorney General of the State of Utah notified all of the potential members of the class situated in the State of Utah. The Attorney General subsequently received an authorization from each of you requesting his office, or a firm authorized by him, to file requisite pleadings for the purpose of intervening in the above-entitled case. Pur-

suant to your authorization and at the direction of the Attorney General, we prepared and filed a Motion to Intervene on behalf of some 64 applicants.

As matter of form and insofar as we were able to do so, we listed the City Attorney, County Attorney or counsel for each of the separate applicants on the Motion for Intervention; however, the Attorney General of the State of Utah and the Special Assistant Attorneys General who have prosecuted this case for the State were listed as the attorneys for the applicants for intervention. Because we considered time to be of the essence, it was not possible for us to contact each of your usual counsel prior to the time the motion was filed with the Court.

In addition to the Motion to Intervene, we filed a proposed Complaint on Intervention, affidavits in support of the motion, a motion of the State of Utah directed to the previous order of the Court, including a motion to amend the Complaint by joining the applicants for intervention as parties plaintiff, together with a proposed Amended Complaint, and a Memorandum in Support of the Motions filed by plaintiff and the applicants for intervention. Because of the bulk of these pleadings and the expense involved, no attempt was made to send copies to each of the applicants. If you desire copies, we will be happy to prepare them. Otherwise, copies of these pleadings, together with all other documents pertaining to this case, are available for inspection at our office.

In due time, we will receive notice from Judge Pence setting this matter for argument. The hearing on the Motion to Intervene will probably be held in Los Angeles, California. If you have not already sub-

mitted an affidavit in response to our previous letters, please do so. These affidavits indicating the amount of pipe purchases made by each of you must be filed in advance of the hearing.

There are several important legal issues which must be resolved by the Court in connection with the Motion to Intervene. Not the least of our problems concerns the statute of limitations, which probably ran on May 24, 1969. In connection with the statute of limitations, it may be important to determine whether the applicant was aware of the pendency of the above-entitled action prior to the entry of Judge Pence's order in regard to the class action. I appreciate the difficulty of determining knowledge or the lack thereof on behalf of a corporate entity. This matter was reported on at least one television news program at the time the State of Utah filed its Complaint. If the applicant's attorney or engineer or any other officer was aware of the pendency of the State's action, please notify us.

It has come to our attention that certain attorneys for defendants in this matter have contacted some of the applicants and attempted to secure an affidavit indicating that they had no knowledge of the pendency of this action. If you are contacted by one of the defendants or their counsel, please refer them to this office. We request that you do not sign any such affidavits or make any communication with the defendants except upon advice from the Attorney General or

the lawyers which he has retained as Special Assistant Attorneys General.

We shall, of course, advise you of developments in this matter from time to time. If any of you or your usual attorneys desire any further information at any time, please do not hesitate to call this office.

Yours truly,

/s/ Gerald R. Miller
Gerald R. Miller

GRM:cw

[Affidavit of Service omitted in printing]
Filed January 22, 1970.

Points and Authorities of Defendants in Opposition to Motions to Intervene and to Amend.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

I
PREFATORY STATEMENT

The State of Utah, as a result of the Court's ruling that this was not a class action, has filed or caused to be filed four separate motions. Each of these motions is asserted to the Court in separate procedural dress, but all, in effect, ask the Court for the same ruling, i.e., reinstate the class action as to all members of the alleged class that the state has now been able to persuade to join in the action.

The pending motions to permit intervention, or alternatively, to amend the complaint to add additional parties, must be viewed against the statute of limitations questions which underlie such motions. Defendants submit that plaintiff and applicants may not employ either Rule 15 or Rule 24 as a device to avoid the bar of Sections 4B and 5(b) of the Clayton Act. The record herein establishes that applicants have slept on their rights long after the statute has run on their purported claims. Applicants would not be before the Court now if plaintiff had not disturbed their slumber *after* the Court's order on December 3, 1969, that this action should not be maintained as a class action.

Defendants' assertion that plaintiff's and applicants' claims are barred by Sections 4B and 5(b) of the

Clayton Act is based upon the following facts: On March 10, 1964, the United States Government initiated five criminal actions against the defendants and others. Pleas of *nolo contendere* were accepted and judgments were entered in these governmental actions on June 19, 1964. On that day, the criminal proceedings terminated. Four days later, the government filed civil actions under the False Claims Act and Section 4A of the Clayton Act, neither of which could invoke the tolling provisions of Section 5(b). Subsequently, on October 28, 1964, the government amended its complaints to add a claim for injunctive relief under Section 4, which claim is an action " to prevent, restrain, or punish violations of the antitrust laws" and may therefore suspend the running of the four-year statute pursuant to Section 5(b). The government civil actions were terminated as to all defendants therein, except American Pipe and Construction Co., with the entry of consent judgments on December 8, 1967. The filing of the complaint in the present action by the State of Utah in April of 1969 was even more than one year after the termination of the government civil actions in December of 1967, as to all but American Pipe and Construction Co. The government civil cases were not terminated as against American Pipe and Construction Co. until May of 1968. This is the basis of defendants' contention that the statute has run even if it were deemed to have been suspended until May 1968. The tardy character of the pending motions is underscored by the history of this West Coast Pipe Case litigation, which, like the present actions, was based upon the conspiracies alleged in the aforesaid government criminal proceedings. These cases included more than 100 separate actions involv-

ing more than 350 claimants in various jurisdictions; seven were class actions with numerous co-plaintiffs and interveners. All were consolidated in a pretrial discovery program. This mass of claims and claimants constituted one of the classic examples of complex, protracted, multidistrict antitrust litigation which some commentators had feared could not be handled by the federal judiciary, at least not within the lifetimes of the witnesses, litigants and other individual participants.

In order to facilitate administration of this litigation and its orderly progress toward a final disposition, Judge Pence determined that all actual and potential claimants must be brought into the judicial machinery under this administration. The Court's ruling was that prospective interveners in the various class actions must file by March 31, 1966. At that time, during discussion of this cut-off ruling, Maxwell M. Blecher, Esq. of the law firm of Joseph L. Alioto, Esq., who was lead counsel for the plaintiffs, stated the intent and common understanding of the Court's ruling:

> "I think, if it please the Court, that the concept be retained but the date changed, let's say to April 30th, so that everywhere, everyone everywhere situated *would have some knowledge that they're either going to be in by that date or suffer some consequence,* whether we call it a penalty or not."

With respect thereto, the Court made the following statement:

> "This April 15th date is in the interest of justice as I see it, justice to all of those who have not slumbered along or procrastinated along on enforcing their rights. . . ."

More than one year after the cut-off date established by the Court, certain new plaintiffs or interveners had come forward, and the defendants then reasonably assumed that all who were going to sue on the alleged conspiracies had done so. Extensive publicity had been given to the litigation in the states west of the Rockies. At this juncture, a settlement was negotiated between plaintiffs and all but one of the corporate defendants. There has never been any doubt that settlement, as opposed to trial of the actions, was the result which was expected and toward which the Court's efforts were heartily directed. In these negotiations, the financial capacity of the smaller corporate defendants, who had made the majority of the pipe sales upon which the claims were based, was a principal factor in determining the amount of the total settlement figure. These smaller defendants indicated that they had been "bled dry" by the litigation and could no longer afford to maintain a defense. *At the same time,* they simply could not afford to pay their pro rata share of a settlement payment if such payments were to be, in the aggregate, acceptable to plaintiffs. Nonetheless, agreement, both between the settling defendants and between them and the plaintiffs, was finally reached, and a settlement agreement was executed on May 5, 1967, providing for a total payment of $21,275,000 to plaintiffs. Of such amount, approximately $4,000,000 was contributed by defendants United States Steel Corporation, Kaiser Steel Corporation and Martin-Marietta Corporation *in addition* to their pro rata shares of the total. This was done in order to fund the total settlement figure.

In agreeing with their co-defendants to contribute an amount in excess of their pro rata shares, these

defendants acted in the firm belief that all persons, particularly public entities, which had any possible basis for suit and which intended to sue were before the Court so that this settlement would constitute a final disposition of all claims arising out of the conspiracies alleged in the government criminal actions. This belief was based not only upon the history of the cases and the understanding of the participants, but also upon the widespread publicity which had been given to the proceedings and the settlement negotiations, including efforts which had been made by counsel for certain of the plaintiff-governmental agencies to enlist other such plaintiffs in the litigation. (See defendants' affidavits concerning dismissal of the present action.)

Defendants submit that by reason of the foregoing facts, applicants' claims are barred by the statute of limitations and the pending motions under Rules 15 and 25 cannot revive those claims.

II

THE PROPOSED INTERVENERS DO NOT ESCAPE THE BAR OF THE STATUTE OF LIMITATIONS BY EMPLOYING EITHER RULES 15 OR 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The pending motions turn on the effect to be given to Section 5(b) of the Clayton Act, which provides as follows:

> "Whenever any civil or criminal proceeding [singular] *is instituted by the United States* to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, *the running of the statute*

of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding *shall be suspended during the pendency thereof and for one year thereafter: Provided, howevever,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action *shall be forever barred unless commenced either within the period of suspension or within four years* after the cause of action accrued." (emphasis added)

In *Maricopa County v. American Pipe and Construction Co.*,[1] the Court rejected the contention that relation back pursuant to Rule 15(c) would save a claim barred by Section 5(b). The Court stated therein:

> "One caveat, however, is illustrated by the present case. Presupposing that before that one year period of suspension following the termination of criminal actions had ended, i.e., June 19, 1965, the government had filed its same False Claims and § 4A actions (as was here done), and *after* June 19, 1965, the government had then amended its civil actions to add an antitrust injunctive count, this court would have no hesitancy in stating that the insertion of the injunctive antitrust count by amendment would not revive any claims already made moribund by the termination of the one-year extension. 'What is dead, is dead', and an *attempted heart transplant by the relation-back*

[1]303 F.Supp. 77 (D. Ariz. 1969).

theory on amendments under F.R. Civ. P. 15(c) would not revive the cause of action."[2] (emphasis supplied)

When actually presented with an "attempted heart transplant" by means of Rule 15(c), the District Court in *Philadelphia Electric Co. v. Anaconda American Brass Co.*,[3] refused to allow relation back of amendments to override the express legislative language of Section 5(b) of the Clayton Act. The court pointed out:

> "Surely, it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right', 28 U.S.C. § 2072."[4]

Whatever the guise of plaintiff's alternative motions, they constitute an attempt to breathe life into actions barred by the statute and are thus contradictory to the foregoing rule of the *Maricopa County* and *Philadelphia Electric* cases. Moreover, such motions contravene the congressional intent in enacting Section 5(b) of the Clayton Act. Such intent is reflected in the following portion of H.R. No. 422, 84th Cong.

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[2] *Id.* at 86. *Cf. Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 207 F.Supp. 252, 256 (N.D. Ill. 1962) in which the court stated that when a governmental entity "seeks intervention of right on behalf of plaintiffs' consumers, it is evident that its rights cannot rise above theirs."

[3] 43 F.R.D. 452 (E.D. Pa. 1968).

[4] *Id.* at 460.

1st Sess. 8 (1955) which delineates the congressional intent in enacting Section 5(b) of the Clayton Act:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. *It believes* the provisions of this bill will tend to shorten the period over which private treble damage cases will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case had been concluded."

Admittedly, applicants' proposed complaints contain language purporting to plead around the statute of limitations. Each of the complaints under consideration alleges that the purported conspiracy continued to the date of the filing of the complaint herein by the State of Utah. However, the State of Utah, in its memorandum in opposition to defendants' motion to dismiss the class action,[5] and applicants, in their memorandum in support of intervention.[6] have conceded the existence of the problem of the statute of limitations and by so doing, have tacitly conceded that allegations purporting to plead around the bar thereof are spurious. Because the bar of the statute would be dispositive of the pending motions to intervene and to amend

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[5]Memorandum in Support of Class Action, pp. 17-19.

[6]Memorandum in Support of Motions filed by plaintiff and applicants for intervention, p. 10.

the complaint and in view of the prior ruling of this Court that the alleged conspiracies ended in 1962, we respectfully submit that it is now encumbent upon plaintiff and applicants to adduce evidence that the alleged conspiracy complained of herein continued beyond 1962; otherwise, it is apparent that under any test, applicants' purported actions are barred by Section 5(b) of the Clayton Act.

III

THE PENDING MOTION UNDER RULE 15 MUST BE DENIED

Plaintiff seeks to amend its complaint by adding as parties plaintiff various governmental agencies within the State of Utah. It appears that by means of this amendment the agencies hope to utilize plaintiff's May 13, 1969, filing and avoid the bar of the statute of limitations. However, even if plaintiff's amendment were allowed, the claims by the agencies would be barred by the statute inasmuch as an amendment which adds *new* parties—whether plaintiff or defendant—after the statute has run will not relate back to the date of the earlier filing.

Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968);

Lewis v. Lewis, 358 F.2d 495, 502 (9th Cir. 1966);

Hoffman v. Halden, 268 F.2d 280, 304 (9th Cir. 1959);

Storey v. Garrett Corporation, 43 F.R.D. 301, 304 (C.D. Cal. 1967);

Monarch Industrial Corp. v. American Motorist Ins. Co., 276 F.Supp. 972, 981 (S.D. N.Y. 1967);

King v. Udall, 266 F.Supp. 747, 749 (D. D.C. 1967);

Martz v. Miller Brothers Company, 244 F.Supp. 246, 249 (D.Del. 1965); and

3 *Moore's Federal Practice*, ¶15.15 [4-1], pp. 1041-1042 and the cases cited at Notes 6, 7 and 8.

See also, *Maricopa County v. American Pipe and Construction Co.*, 303 F.Supp. 77, 86 (D. Ariz. 1969), wherein the court stated:

> "[A]n attempted heart transplant by the relation-back theory on amendments of F.R.Civ.P. 15(c) would not revive the cause of action."

Since the "attempted heart transplant . . . would not revive the cause of action" of the proposed parties, it is apparent that it would serve no purpose to permit plaintiffs to amend to add such parties. Rule 15(c) of the F.R.C.P., which allows "relation back of amendments" in some instances, states:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied, and, *within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits,* and (2) knew

or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added)

Although Rule 15(c) does not discuss amendments adding parties plaintiff, the Advisory Committee's Notes of 1966 state:

"The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[6a]

It is apparent that plaintiff has not and cannot satisfy the requirements of Rule 15(c). Defendant received no notice of the claims by the agencies prior to the time the statute of limitations ran and there can be no claim by plaintiff or the proposed interveners that there is any issue with respect to "a mistake concerning the identity of the proper party. . . ." Clearly, defendants would be prejudiced if claims can be maintained after the running of the statute. Moreover, in order to justify relation back of an amending adding additional parties plaintiff,

"[s]ufficient identity of interest between the original and new plaintiff would have to be shown, so that *the assertion of a wholly new cause of action is not sanctioned; and absence of prejudice to the defendant—the adversary of the party to be joined—would still be a crucial factor.* Al-

[6a] *Moore's Federal Practice* ¶15.01 [9], p. 811.

> though situations which justify relation back of an amendment under *Rule 15*, joining a complete stranger to the original action as plaintiff, will probably be rare, the expansion of *the rule should be significant in persuading courts to permit relation* back of *amendments changing the capacity in which plaintiff brings suit.*[7] (Emphasis added)

Both the general prohibition of relation back and its exceptions are based upon the theory that amendments adding new parties amount to the assertion of new causes of action. To allow such amendments to relate back would, in most instances, destroy the statute of limitations. This is in conflict with the principle that a new defendant cannot be substituted or added by amendment after the statute of limitations has run.

A similar motion to amend a complaint to add new plaintiffs after the statute of limitations had expired was denied in *Iocono v. Anastasio,* 79 F.Supp. 378 (S.D.N.Y. 1948). In *Iocono,* an action was brought by thirty-five specifically named plaintiffs to recover alleged unpaid overtime compensation. The plaintiffs moved for leave to amend a complaint by adding as plaintiffs such other employees of the defendant who may join as plaintiffs in the action before trial. In denying plaintiffs' motion, the court concluded that:

> ". . . It will not suffice that someone else has a pending lawsuit against the defendant sought to be charged, in which similar but neverthelss different and separate claims are alleged, and that though some ignorance or excusable neglect reference to the person seeking to intervene and to his separate and individual claim was wholly

[7] *Id.* at ¶15.15 [4-2], pp. 1051-1052.

omitted. No amount of good excuses or equitable considerations of one sort or another can alter the fact that there is not now pending any action whatever by or on behalf of these individual claimants. Accordingly, the relief prayed for must be withheld. To hold otherwise would be to dispense with the most elementary requirements of due process." *Iocono v. Anastasio,* 79 F.Supp. 378, 382.

A similar holding can be found in *Aarhus Oliefabrik, A/S v. A. O. Smith Corporation,* 22 F.R.D. 33 (E.D. Wis. 1958). This action was originally brought by Aarhus against Smith, to recover damages for an alleged breach of warranty in connection with the sale of certain machinery by Smith to Aarhus. The defense of lack of privity was raised, defendant contending that the sale was made not to Aarhus but to Topsφe, who then resold the machinery to Aarhus. Aarhus sought to amend his complaint by adding Topsφe as an alternative plaintiff. The court denied plaintiff's motion, stating that:

". . . But here, an attempt is made to bring in a separate claim. The original complaint was a suit upon a contract between Aarhus and Smith. The amendment seeks to bring in a suit on a contract between Topsφe and Smith after such suit has been barred or destroyed by running of the statute of limitations. This should not normally be allowed." [Citations omitted]. *Aarhus Oliefabrick, A/S v. A. O. Smith Corporation,* 22 F.R.D. 33, 36-37.

In *Murfkan v. Kahn,* 11 F.R.D. 520 (S.D. Fla. 1951), suit was initiated by plaintiff to recover treble damages under Section 205 of the Housing and Rent

Act of 1947. A motion to add plaintiff's wife as an additional plaintiff, after the statute of limitations had run, was denied. The language of the court in denying the amendment is directly relevant to the issues presented in the case at bar. The policy considerations articulated by that court shed considerable light on the problems facing this court.

> "[A]n amendment will not be allowed if it introduces a new cause of action which as an independent proceeding would be barred by the statute of limitations. * * * Where, as in this case, the right of action is specifically created by the statute and that right qualified by requiring that the action be commenced within a certain time, there is even more reason to require each plaintiff to institute his own suit against the defendant within the time allowed. * * *
>
> "Even though the rights of the original plaintiff and the plaintiff sought to be added arose out of the same transaction and though the cause of action may be the same, an amendment will not be allowed to permit the addition of a party plaintiff after the expiration of the time allowed by statute in which to institute suit." *Murfkan v. Kahn*, 11 F.R.D. 520, 522.

Accord,

Messelt v. Security Storage Co., 14 F.R.D. 507, 513 (D. Del. 1953); and

Kerner v. Rackmill, 111 F.Supp. 150, 151 (M.D. Pa. 1953).

It is only in cases [unlike the instant suit] where the amendment corrects a misdescription of a party actually served or changes the capacity in which a party is su-

ing or being sued, the adverse party has fair notice within the limitations period that a particular claim will be brought against him, and the policy of the statute is fulfilled. Accordingly, relation back is allowed in such instances.

Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968);

People of the Living God v. Star Towing Co., 289 F.Supp. 635, 641 (E.D. La. 1968);

Storey v. Garrett Corporation, 43 F.R.D. 301, 304 (C.D. Cal. 1967); and

Martz v. Miller Brothers Company, 244 F. Supp. 246, 249 (D. Del. 1965).

In the present case, the agencies seeking admission as parties plaintiff have no identity of interest with the State of Utah. Their purported claims are based upon entirely different transactions from those upon which the State of Utah seeks to recover and assert a "wholly new cause of action" which is not sanctioned. To allow addition of these agencies after the running of the statute would contravene Rule 15(c) as written and nullify Section 5(b) of the Clayton Act as a statute of limitation. Accordingly, plaintiff's motion to amend must be denied.

Aarhus Oliefabrik v. A. O. Smith Corporation, supra;

Murfkan v. Kahn, supra;

Messelt v. Security Storage Co., supra; and

Kerner v. Rackmill, supra.

IV

THE MOTION TO INTERVENE UNDER RULE 24 SHOULD BE DENIED.

Applicants seek to intervene in the present action as a matter of right pursuant to Rule 24(a)(2), or alternatively, as a matter within the Court's discretion pursuant to Rule 24(b)(2). Applicants cannot meet the requirements of Rule 24(a)(2) or of Rule 24(b)(2). Moreover, applicants' claims are barred by the statute of limitations, and it would serve no purpose to allow intervention for the purpose of asserting barred claims. Accordingly, the motion to intervene should be denied.

(A) *Intervention as a matter of right.*

Applicants cannot meet the requirements of Rule 24(a)(2) which provides:

> "*Upon timely application* anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

(1) Interveners' interest.

In order to intervene as of right, applicants must show an interest in the property or transaction which is the subject of this action. They admit that they do not have "an economic interest in the damage which the State of Utah sustained."[9] They argue, however,

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[9]Memorandum in Support of Motions Filed by Plaintiff and Applicants for Intervention, p. 5.

that Rule 24 was liberalized by amendment in 1966 and that recent cases, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) and *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967), have so broadened the rules regarding the required interest as to include the interests applicants allege herein.

We submit, however, that the standards respecting Rule 24 do not encompass interests such as applicants claim herein. In the *Cascade* case, the Supreme Court allowed the State of California and Southern California Edison Company to intervene in a divestiture suit. The Court found that the purpose of the divestiture suit was to restore competition in the market for natural gas and that the State of California, on behalf of its citizens, and Southern California Edison Company as a large industrial user, had a sufficient interest in the restoration of competition in the geographical area in question to qualify as interveners. In the present action, applicants have no such interest. Their interest is in contravening the clearly defined congressional policy with respect to Section 5(b) as a statute of repose. The United States Government has already obtained criminal judgments on the basis of the conspiracy now alleged by applicants and has obtained injunctive relief against further conspiratorial conduct by defendants. Applicants are clearly not imbued with the purpose which their prayer for injuncture relief might indicate. Their interest is in recovering treble damages and nothing else.

Similarly, in *Smuch v. Hobson*,[10] the court found that parents of children in segregated schools have

[10]408 F.2d 175 (D.C. Cir. 1969).

sufficient interest in the education of their children to justify intervention in a suit already begun by school board officials. In *Nuesse v. Camp*,[11] the Wisconsin Banking Commissioner was allowed to intervene in a suit by a state bank to enjoin the United States Comptroller of Currency from authorizing a national bank to open a branch where state law would not permit branch banking by state banks. In both these cases, and in *Cascade*, the interveners were attempting to implement important and well-defined public policies. In the present action, applicants merely wish to make use of the State of Utah's earlier filing date in hope of avoiding the bar of the statute of limitations.

(2) Timeliness.

Rule 24(a)(2) requires that applicants to intervene be timely.

> See, *United States v. Blue Chip Stamp Co.*, 272 F.Supp. 432, 435 (C.D. Cal. 1967); and *Basle Theatres v. Warner Bros. Pictures Distrib. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

The complaint herein has been pending since May 13, 1969. Applicants did not seek to intervene until they were solicited by plaintiff *after* the Court's December 3, 1969, ruling with respect to the class action. This fact alone requires that intervention be denied on the issue of timeliness. We submit that applicants are guilty of the ultimate failure to comply with the requirement of timeliness in that they deferred their motion to intervene until a date after the statute of limitations had run against their claims. (See discussion concerning the statute of limitations, Point II, *supra*.) Applicants' motion is untimely not only with respect to the

[11] 385 F.2d 694 (D.C. Cir. 1967).

statute of limitations, but also with respect to the history of the West Coast Pipe Cases. Applicants' claims are based upon the same conspiracies alleged in the West Coast Pipe Cases. As this Court's decision on defendants' class action motion points out,[12] applicants had more than an adequate opportunity to join the West Coast Pipe Cases during the lengthy period of that litigation. Applicants' failure to join that litigation or to join the present action before the running of the statute of limitations renders the motion to intervene untimely, and for this reason alone, intervention must be denied.

Mullins v. DeSoto Securities Co., 2 F.R.D. 502 (W.D. La. 1942);

Lockwood v. Hercules Powder Co., 7 F.R.D. 24 (W.D. Mo. 1947).

(3) Prejudice to defendants.

If a prospective intervenor could relate its claim back to a date which would escape the bar of the statute of limitations, the utmost prejudice would accrue to each of the defendants. In this connection, *Maricopa County v. American Pipe and Construction Co.*,[13] held that defendants are badly harmed by the failure of the statute to run as to them. It is well settled that where prejudice would accrue to defendants by reason of the motion to intervene, it must be denied and particularly, where there are compelling equities in favor of defendants and against plaintiffs.

See, *Carpenter v. Wabash Ry.*, 103 F.2d 996 (8th Cir. 1939);

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[12]Decision on Defendants' Motion Opposing the Class Action, pp. 3-4.

[13]303 F.Supp. 77, 87 (D. Ariz. 1969).

Strickler Eng'r Corp. v. Michael Flynn Mfg. Co., 23 F.R.D. 12 (E.D. Pa. 1958);

Kimberly Knitwear v. Hall, 20 F.R.D. 145 (S.D.N.Y. 1957); and

United States v. Loew's Inc., 20 F.R.D. 423 (S.D. N.Y. 1957).

See also,

Foman v. Davis, 371 U.S 178, 182 (1962);

Graves v. General Insurance Corporation, 412 F.2d 583, 585 (10th Cir. 1969);

Dalweld Co. v. Westinghouse Elec. Corp., 9 F.R.Serv.2d 15a. 32, Case 3.

3 *Moore's Federal Practice*, ¶ 15.15[4-2], pp. 1051-52.

(B) *Permissive Intervention*

Rule 24(b)(2) provides for permissive intervention as follows:

> "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Even if applicants' claims have a question of law or fact in common with the existing action, and this Court's decision[14] casts doubt with respect thereto, permissive intervention is a matter to be decided in the

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[14]Decision on Defendantss' Motion Opposing Class Action, pp. 5-6.

sound discretion of the court, taking into account the timeliness of the application and potential prejudice to existing parties. As set out above, both of these considerations require that the court deny the application to intervene.

(C) *Relation Back and the Statute of Limitations.*

As stated above, *Maricopa County v. American Pipe and Construction Co.*, held that the statute of limitations on the claims now asserted by applicants ran on May 24, 1969. Inasmuch as applicants did not file their Motion to Intervene until December 11, 1969, applicants' claims are now barred, and it would be an idle act for the Court to grant the motion to intervene.[15] As stated in *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F.Supp. 553, 564 (D. Hawaii 1948):

> ". . . Under ordinary rules, since the filing of a petition to intervene marks the introduction of a new party and a new cause of action the situation is measured for the purposes of the statute of limitations as of the date it was filed. If that date was not within the time limited, the intervention is barred."

Although some cases (based on facts not involved herein) have held that filing of a class action tolls the statute as to subsequent intervening class members, it is clear that where the class aspect of the action is subsequently dismissed, the would-be class members do not get the benefit of the earlier filing. The rule of law is that the statute is not tolled and intervener claims

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[15] *Robertson v. Alaska Juneau Gold Mining Co.*, 61 F.Supp. 265 (N.D. Cal. 1945) *rev'd* on other grounds, 157 F.2d 876.

are barred by the statute. As the court in *Philadelphia Electric Co. v. Anaconda American Brass Co.*,[16] stated:

> ". . . [W]here the determination is negative, and a class action is, in the words of the Committee, 'stripped of its character as a class action' (39 F.R.D. at p. 104), it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members.
>
> "*If the reason for the negative determination is failure* to meet the prerequisites of 23(a) or even if the reason is that the common questions do not predominate over individual questions under *23(b)(3)* it would seem reasonable to conclude that such *negative determination* also relates back to the filing of the *complaint*. If there never really was a class to be represented, members of the purported class can scarcely be heard to claim that they started suit, vicariously, before the limitations period expired. But if the reason for the negative determination stems from a weighing of various considerations of judicial housekeeping, it may well be that the decision should not relate back to the commencement of the action, and that, at the very least, an opportunity should be presented for proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations. Any other approach would make it virtually mandatory for every class member to file a cautionary separate action within the limitations period."

The *Philadelphia Electric* case is dispositive of the present motions to intervene. The purported class in

[16] 43 F.R.D. 452, 461 (E.D. Pa. 1968).

the present action was dismissed by the Court because the purported class did not meet the basic requirements of Rule 23(a). As the Court's decision stated:

> "What *is* fatal to plaintiffs' class action allegations are the raw facts of the past five years litigation on almost precisely the same facts and problems of law set forth in plaintiffs' complaint. . . . From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful. To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b)(3).
>
> "The court therefore finds that *the first prerequisites to a class action have not and cannot here be met.* Defendants' motion that this action not be maintained as a class action is GRANTED."[17] (Emphasis added).

Therefore, there never really was a class to be represented; there was no "vicarious" filing by the State of Utah, and applicants' claims are barred by the statute of limitations. This outcome is not dictated by legal

[17]Decision on Defendants' Motion Opposing Class Action, pp. 6, 8.

fiction regarding class actions; it is based upon reason and logic. If a party could toll the statute of limitations on behalf of future interveners by merely alleging a bogus class action, the statute of limitations would be nullified. *Philadelphia Electric* sets out the only practical method of dealing with this problem: if there was a class, interveners should receive the benefits of the earlier filing; if there was no class, mere allegations thereof should have no effect on the statute of limitations.

V

MOTION TO VACATE THE COURT'S ORDER CONCERNING THE CLASS ACTION SHOULD BE DENIED.

It is elemental that a prerequisite to maintenance of a class action under Rule 23(a)(1) is that "the class is so numerous that joinder of all members is impracticable, . . ." In this connection, the Court also found in paragraph 2 of its order of December 3, 1960, specifically as follows:

> "The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impracticable."[18]

Although plaintiff seeks to vacate the Court's order concerning the class action, it is significant that plaintiff has made no showing that the class is so numerous that joinder of all members is impracticable and has established no facts to show that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. We, therefore,

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[18]Findings of Fact and Order Respecting Class Action, p. 2.

submit that plaintiff has established no basis for vacating the Court's order of December 3, 1969, and the case is squarely within the rule stated in *Polakoff v. Delaware Steeplechase and Race Ass'n.*,[19] as follows:

> "Actually the plaintiffs herein represent only themselves. Accordingly, a dismissal of the [class] action will in no way prejudice other members of the class unless they could claim prejudice by reason of the bar of the statute of limitations since they have failed to heretofore intervene. If such a bar does exist, it is the result of their lethargy and indifference and not of the breach of any duty, moral or otherwise, on the part of the plaintiffs or the Court to awaken them from their slumber."

We shall not reiterate the arguments heretofore made to the Court in our prior briefs, but on the basis thereof, on the Court's own findings and on the affirmation thereof in the factual showing by plaintiff and applicants with the pending motions, it appears conclusively that the Court's order is wholly correct and should not be vacated.

VI

THIS ACTION SHOULD NOT BE CERTIFIED PURSUANT TO 28 U.S.C. § 1292(b).

Plaintiff has moved to certify for appeal, pursuant to 28 U.S.C. § 1292(b), the question of whether the present action should be maintained as a class action. We submit that plaintiff's request for certification pursuant to the foregoing statute contravenes the intent thereof as well as the intent which underlies the

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[19]264 F.Supp. 915 (D. Del. 1966).

enactment of Rule 23, F.R.C.P. Plaintiff has failed to establish that there are controlling questions of law the immediate determination of which materially advance the ultimate termination of the litigation. Furthermore, Rule 23 requires the District Court, in every action in which a class action is alleged, to determine as soon as practicable whether the action is to be maintained as a class action. Thus, the question which plaintiff would have the Court certify is not a unique or controlling question of law, but is one which must be determined in every action in which a class is alleged. Indeed, as stated by the court in *City of New York v. International Pipe & Ceramics Corp.*:[30]

> "The key words of Rule 23 are 'fair and efficient adjudication.' . . .
>
> "[1] In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation."

We therefore respectfully submit that in view of the broad discretion which inheres in the trial court in every determination which must be made pursuant to Rule 23 of the F.R.CP., the determination of this Court at issue herein is discretionary and is not subject to certification pursuant to Section 1292(b).

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[30]410 F.2d 295, 298 (2d Cir. 1969).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that each of the pending motions must be denied.

DATED: January 22nd, 1970.

Respectfully submitted,

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Filed January 22, 1970.
[Affidavit of Service omitted in printing]

Affidavit of Oliver F. Green, Jr., in Opposition to Motion to Intervene as Plaintiffs or in the Alternative, to Amend the Complaint to Add Additional Parties.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

OLIVER F. GREEN, JR., being first duly sworn, deposes and says that:

I am one of the attorneys for U.S. Industries, Inc. (hereinafter "USI"), a defendant herein.

1. I am now, and at all times prior to March 1964 have been, one of the attorneys representing USI in connection with both the United States Government criminal actions as well as all the civil actions against this defendant, frequently referred to as the "West Coast Pipe Case litigation."

2. Despite the allegations of the proposed complaint in intervention that USI has been engaged in the manufacture and sale of pipe and has participated in the alleged conspiracy since at least 1958 to the date of the filing of the complaint, USI did on or about December 20, 1963, sell its pipe plant which was known as its Tubular Products Division to American Pipe & Construction Co. (Complaint, p. 6, para. 9[h]; p. 9, para. 24).

3. The sale by USI of its pipe manufacturing plant and USI's ceasing to engage in the manufacture and sale of pressure pipe has been a matter of public

knowledge since early January 1964. In fact, on December 21, 1964, the United States Government filed, in the United States District Court for the Central District of California, Civil Action No. 64-1775-MP entitled "United States of America, Plaintiff, vs. American Pipe and Construction Co. and U.S. Industries, Inc., Defendants" alleging the fact of said sale and seeking to have the Court set aside said sale pursuant to Section 7 of the Clayton Act.

4. The filing of Action No. 64-1775-MP is reported in 5 CCH Trade Regulation Reporter, page 52,-582 (Case 1838).

5. USI, having been out of the pipe business with respect to which the complaint in intervention relates for more than 6 years, will suffer prejudice if the Court does not deny the Motion to file the complaint in intervention by reason of the following facts:

(a) Upon the sale of its pipe manufacturing plant in December 1963, all employees at the pipe plant, excepting one, ceased to be employees of USI.

(b) The one employee formerly employed at the pipe plant was the controller of the pipe plant and was not involved in the manufacture, sale or distribution of the product. To the best of my recollection, said employee, whose employment at the pipe plant commenced in or about 1960, had never previously been employed in connection with any pipe manufacturing operation.

(c) Since the sale of the pipe plant, USI's records pertaining thereto have become widely scattered and some may have been lost. Certain records were deposited in the Document Depository. Other records, the nature of which is unknown to me, were forwarded for

storage to a warehouse in New Jersey. Certain other records have been maintained at affiant's offices. In addition, other records, the nature and content of which is not known, were left at the pipe plant. By reason of the passage of time the records pertaining to USI's operation of the pipe plant from its acquisition in October 1955 to its sale in December 1963, are not located in any central storage area. In addition, USI now has no employee who is familiar with either the content of or the location of all of the records once maintained at its pipe plant.

(d) On or about May 5, 1967, USI entered into a settlement agreement which disposed of all then pending West Coast Pipe Case litigation between plaintiffs and the settling defendants. In early 1967, when it became apparent that the settling defendants and plaintiffs would settle the cases, USI terminated the services of non-lawyer personnel which it had retained in connection with the case, including the out-of-state economic expert and his assistants whom USI had retained to prepare its economic defense. By reason thereof, the economic studies then underway were never completed. The preparation of a meaningful economic defense to the proposed complaint in intervention could only be accomplished at a tremendous expense to USI, much of which expense would be duplicative of the expenses previously incurred prior to the settlement agreement of May 5, 1967.

(e) USI entered into the settlement agreement of May 5, 1967, in the belief that the notoriety given to the West Coast Pipe litigation had resulted in all persons who had claims against the defendants having appeared before the Court and in the further belief

that all other potential or contingent claimants had reached a decision that their potential or contingent claims lacked merit and in the further belief that the settlement agreement represented an end to the long and expensive litigation.

6. To grant intervenors' Motion after USI has been out of the pipe business for 6 years, after it spent more than $2,000,000 in the defense and settlement of the West Coast Pipe cases, after its books, records and documents necessary for the defense of the action have become scattered, misplaced or lost, after the preliminary work by its economic expert and his staff has been rendered useless by the passage of time, and after the witnesses necessary to USI's defense have scattered, would permit the laggards to profit by their delay at the expense of and to the prejudice of defendants.

The long history of this litigation does not require that ". . . the last shall be first."

/s/ Oliver F. Green, Jr.
OLIVER F. GREEN, JR.

Executed January 22, 1970.
[Notarial Acknowledgment omitted in printing]
[Affidavit of Service omitted in printing]
Filed January 22, 1970.

Affidavit.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

Haldor T. Benson, being first duly sworn, deposes and says:

1. I am one of the attorneys for Utah Concrete Pipe Company, one of the defendants in the above captioned case.

2. It came to my attention and the attention of counsel for the other defendants in this matter that the Utah State Attorney General's office, following the entry of the order that this case not be maintained as a class action, was attempting to have other political subdivisions of the State of Utah intervene in this case.

3. On December 30, 1969, I contacted the attorneys for two of such political subdivisions, namely the City Attorney for Springville City and the City Attorney for the City of Nephi. The purpose in my contacting these City Attorneys was to determine the date on which they had first been advised of this lawsuit by any representative of the State of Utah. I advised each of these City Attorneys that I would like to obtain an Affidavit from the appropriate office of each city, which Affidavit would recite the date of the first contact.

4. The City Recorder for Springville City advised that the first contact with the city came in the form of a "Notice" dated December 4, 1969. He executed an Affidavit to that effect to which a copy of the "Notice" is attached. Said Affidavit is attached hereto as Exhibit "A" and incorporated herein by reference.

5. The City Attorney for Nephi City and the City Coordinator for Nephi City both advised me that said December 4 "Notice" was the first contact that Nephi City had received to the best of their knowledge. The City Attorney, however, declined to have an Affidavit to that effect signed on behalf of Nephi City until he had conferred with the Attorney General's office. I encouraged him to make what ever inquiry he wished. In his letter to me dated December 31, 1969, the Nephi City Attorney further advised: "After checking with the Attorney General's office, I decided that a representative of Nephi City should not sign the Affidavit which you left." A copy of that letter is attached hereto as Exhibit "B" and incorporated herein by reference.

Dated this 20th day of January, 1970.

/s/ HALDOR T. BENSON
Haldor T. Benson

Executed January 20, 1970.

[Notarial Acknowledgement omitted in printing]

EXHIBIT "A" TO AFFIDAVIT OF HALDOR T. BENSON

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT

[Jurat omitted in printing]

Verl S. Dallin, being first duly sworn, deposes and says:

1. I am employed by Springville City, in the capacity of City Recorder, and have been employed by Springville City since March 15, 1950.

2. To the best of my knowledge, information and belief, no representative of the State of Utah ever contacted any representative of Springville City in regard to the above captioned lawsuit prior to the receipt of the "Notice" dated December 4, 1969, a copy of which is attached hereto and incorporated herein by reference.

Dated this 30th day of December, 1969.

/s/ Verl S. Dallin

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

ATTACHMENT TO AFFIDAVIT OF VERL S. DALLIN

NOTICE

THIS NOTICE MAY BE CRITICAL TO YOUR INTERESTS.

If you have purchased steel pipe or concrete pipe for the conveyance of water or sewage subsequent to 1946, you will be particularly interested.

There is considerable evidence that many such purchases were made at artificially high prices resulting from a price fixing conspiracy among suppliers.

Not only have federal criminal actions resulted in convictions of certain of these suppliers, but civil actions in other western states have resulted in cash settlements to units of government of approximately 30 million dollars.

Since you had not filed suit on your own behalf and the limitation period was about to expire, in an effort to protect your interest along with the State's interest, this office sought to bring a class action in a civil suit filed against suppliers in the United States District Court.

We have now, however, received a ruling from the District Judge that our office cannot represent you without your specific authorization. This ruling was unexpected inasmuch as other states had been able to include their political subdivisions in a class action. This means that, as the case now stands, you are out of court.

There is a possibility, despite this, that your rights can still be protected. For us to help you do this, it will require that your governing board immediately execute the enclosed resolution and return it to this office within the next six days because statute of limitations problems are paramount.

The other information we will need can be put together later, but the authorization cannot wait. This is an emergency and you must act at once if you wish to assert a legal claim.

DATED December 4, 1969.

/s/ Vernon B. Romney
VERNON B. ROMNEY
Attorney General

ATTACHMENT TO AFFIDAVIT OF VERL S. DALLIN

AUTHORIZATION TO REPRESENT

The undersigned governmental entity does hereby request and authorize the Attorney General of the State of Utah, or any attorney or firm authorized by him, to represent it and to file requisite actions, motions or appeals for the purpose of intervening on its behalf in the case of *State of Utah v. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company, United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industires, Inc.*, Case No. C 177-69, now pending in the District Court for the United States, Central District of California, on pretrial transfer from the District of Utah, or any corollary, or to file an independent action if he deems that course of action advisable.

The undersigned does hereby also agree to pay a pro rata share of the actual and necessary expenses of the action provided that our express authorization shall be required for any commitment on our part in excess of a total of $500.00.

DATED .....

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EXHIBIT "B" TO AFFIDAVIT OF HALDOR T. BENSON

[Printed Letterhead of Nephi City Corporation omitted in printing]

December 31, 1969

Haldor T. Benson
Attorney at Law
141 East First South
Salt Lake City, Utah 84111

Re: State of Utah vs. American Pipe Co. et al.
Civil No. 69-1964 MP
C-177-69 Anti-Trust case

Dear Mr. Benson:

Thank you for calling at my office last Monday. After checking with the Attorney General's office, I decided that as a representative of Nephi City [I] should not sign the affidavit which you left. For further information, please contact Mr. Bob Hansen with the Attorney General's office.

Best wishes for the New Year.

Very truly yours,

/s/ UDELL R. JENSEN,
Udell R. Jensen,
Nephi City, Attorney

URJ:al

CC: Mr. Vernon B. Romney, Attorney General
Mulliner, Prince & Mangum, Lawyers
Nephi City Recorder

[Affidavit of Service omitted in printing]

Filed January 22, 1970.

Supplemental Memorandum of Utah Concrete Pipe Company in Opposition to Motions to Intervene And to Amend.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

FACTUAL BACKGROUND

Utah Concrete Pipe Company ("Utah Concrete"), joined in the Memorandum of Points and Authorities filed January 22, 1970, by the defendants in opposition to the pending motions to intervene and to amend. This supplemental memorandum is required by facts that were discovered subsequently. On January 21, 1970, the day prior to the filing of the defendants' Points and Authorities, Utah Concrete's attorneys received plaintiff's Answers to the defendants' "transaction" interrogatories. They were reviewed, and a program was established to complete the verification procedure provided for in the Court's order of December 9, 1969.

The first step in the verification program necessarily involved a review of the records of Utah Concrete to determine the procedures that would be followed. As explained in the Affidavit of Amos Clements, which is filed herewith, the books and records of Utah Concrete are his responsibility; and the task of performing the verification of the plaintiff's answers became his responsibility. On or about February 3, 1970, the fact became apparent that Utah Concrete had no records for a major part of the time period covered by plaintiff's answers. Plaintiff's alleged transactions ex-

tend from 1946 through 1969. Utah Concrete has no business records with which to verify any transactions that allegedly occurred prior to January, 1963.*

PREJUDICE TO UTAH CONCRETE

The substantial and unfair prejudice that will result to Utah Concrete from granting any of the pending motions is obvious. Utah Concrete Pipe Company has never been a party to, or named in any of the West Coast pipe cases, upon which this case is founded. (Charles Ward Affidavit, January 16, 1969). There has been no reason for it to maintain aging business records longer than needed for business and tax purposes. This it has done. Its records are believed to be substantially complete to January 31, 1965, and have been maintained to January 1, 1963, although differently organized. (Amos Clements Affidavit.) Yet it now finds itself faced with the impossible task of trying to defend itself against alleged illegal transactions which allegedly occurred as long ago as the date of its organization in 1952.

The prejudice to Utah Concrete from being challenged by the present plaintiff, alone, on transactions extending over an 11-year period (1952-1963), for which it has no records to document a defense, is real. If the sixty-odd proposed interveners were permitted to come into this suit under any of the procedural guises employed, and press their overly-stale claims, the prejudice would be multiplied accordingly.

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*Utah Concrete Pipe Company was organized on January 31, 1952; hence, it is not involved in the transactions alleged by plaintiff prior to that date.

The substantial and unfair prejudice stemming from this unavailability of business records is yet another example of the prejudice to the defendants that would result from the approval of any of the motions to amend or intervene. Such prejudice is certain to be the fate of all of the defendants in numerous additional ways. This is made abundantly clear in the defendants' Memorandum of Points and Authorities in Opposition to the Pending Motions to Intervene or to Amend. Said Memorandum also demonstrates the propriety of denying the pending motions under the Rules, Statutes and Cases in Point.

Dated this 6 day of February, 1970.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY

/s/ Haldor T. Benson
Haldor T. Benson

/s/ James R. Amschler
James R. Amschler
Attorneys for Defendant,
Utah Concrete Pipe Company

[Certificate of Service omitted in printing]

Affidavit.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Amos Clements, being first duly sworn, deposes and states as follows:

1. I am employed by Utah Concrete Pipe Company in the position of Office Manager. My office is located in the principal office of Utah Concrete Pipe Company at 379 17th Street, Ogden, Utah. I began my employment with Utah Concrete Pipe Company on November 9, 1961, and have held the position of Office Manager at the above office since June, 1964.

2. As Office Manager, the accounting records and other business records of Utah Concrete Pipe Company are under my direct supervision and control. I have the responsibility for their correct preparation, maintenance and storage.

3. On or about January 26, 1970, I received from Mr. Charles Ward, the President of Utah Concrete Pipe Company, a copy of the State of Utah's Answers to Interrogatories, which specify the alleged transactions that the state relies upon in support of its complaint in this action. I was requested to undertake to verify, from the records of Utah Concrete Pipe

Company, the data listed in said answers to the extent that such verification could be accomplished.

4. A thorough and complete search of all of the accounting and other business records of Utah Concrete Pipe Company disclosed that Utah Concrete Pipe Company has no business records from which any of the alleged transactions listed by the state as occurring prior to January 1, 1963, can be verified. All such records have been discarded or destroyed in accordance with Utah Concrete Pipe Company's records retention program, since they had ceased to serve any business purpose. All of such records were discarded or destroyed prior to the commencement of the above captioned lawsuit. Upon the filing of this lawsuit, Utah Concrete Pipe Company's records retention program was suspended, and no records have been discarded since that time. Utah Concrete Pipe Company's records are believed to be substantially complete to January 31, 1965, and have been maintained, although organized in a different form, to January 1, 1963.

Dated this 6th day of February, 1970.

/s/Amos Clements

Executed February 6, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit of Dominic B. King.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

D. B. King, being duly sworn, deposes and says that:

1. I am one of the attorneys for U.S. Steel (hereinafter referred to as "USS"), a defendant herein. I have had accounting personnel of USS examine in detail the claims submitted by the Department of Highways of the State of Utah submitted in response to defendants' transaction interrogatories. No other state agency of Utah has submitted any answers to these transaction interrogatories. All answers of the Department of Highways claim purchases only of concrete pipe. No steel pipe purchases are claimed and no alternate steel was provided in any of the claimed purchases.

2. An examination of USS records shows that USS has identified only one sale of water pipe to the State of Utah during the entire period January 1, 1953, to December 31, 1965. The bid date for this job was March of 1959, and the total amount of the sale for the pipe was $842.

3. In handling the defense of the west coast pipe cases, USS established a task force made up for most of the period of time from 1964 until settlement of the cases in 1967 of up to 13 full-time people, plus part-time help, consisting of accounting and secretarial help. This group worked exclusively on the assembly of records and accumulation of the voluminous data

involved in those cases. Records for USS were accumulated from several different plant locations and district offices as well as the record retention headquarters of USS at Annandale, Pennsylvania, and assembled at the Maywood Plant of USS in Los Angeles during the pendency of the west coast pipe cases.

After the settlement of these cases in May of 1967, this entire task force was disbanded with 11 of the 13 members of the task force either having retired, quit, or been laid off and the records have been sent back to the appropriate plant or office locations or the record retention headquarters of USS.

4. USS engaged in the same economic preparation for defense of these cases as outlined in the affidavit of Oliver F. Greene of January 22, 1970. The reinstitution of a meaningful economic defense preparation by USS could only be accomplished at great expense to USS, much of it being a duplication of expenses previously incurred prior to the May 5, 1967, settlement, and with great effort in reassembling records and personnel to work on such matters.

/s/ D. B. King
D. B. King

Executed February 24, 1970.
[Notarial Acknowledgment omitted in printing]
[Affidavit of Service omitted in printing]
Filed March 3, 1970.

Decision on Motions to Intervene, Amend, Etc.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, v. American Pipe and Construction Company, United Concrete Pipe Corporation, Utah Concrete Pipe Company, W. R. White Company, United States Steel Corporation, Kaiser Steel Corporation, Smith-Scott, Inc., U.S. Industries, Inc., Defendants. Civil No. 69-1964-MP.

The motions before this court are but sequelae of this court's decision and order of December 17, 1969, 49 F.R.D. 17, that this Sherman 1 antitrust case, filed as a class action by the State of Utah under Rule 23(b)(3), F.R.Civ.P., was not to be so maintained. As indicated in that prior ruling, Utah filed this Sherman 1 antitrust suit on May 13, 1969, just eleven days before the statute of limitations in these "Western Pipe" cases ceased to be tolled under Clayton 5(b) (15 U.S.C. § 16(b)). In those eleven days none of the moving parties now before this court filed any actions or motions, nor did any do so until after this court's December 3, 1969 decision. Now, after solicitation to do so by the State of Utah, some 60-odd towns and cities, and water and sewer districts in Utah (petitioners), through Utah's counsel, have: (1) moved, pursuant to Rule 24(a)(2) or in the alternative to Rule 24(b)(2), F.R.Civ.P., to intervene as plaintiffs in the Utah action; and as an alternative, (2) Utah has moved for leave to amend its complaint by adding these petitioners as parties-plaintiff; (3) as an alternative to that, Utah has moved that the court alter or amend its order of December 4, 1969, pursuant to Rule 23(c)(1),

F.R.Civ.P., so as to reinstate this as a class action as to those same petitioners. (4) As yet another alternative, Utah has moved the court for an order directing that notice be given to all members of the class alleged in plaintiff's original complaint advising them of the decision of the court to terminate the class action and then giving them a reasonable time in which to intervene in the present action. Coupled with this is the supplemental motion that the court's order of December 4 be vacated pending such notice and intervention "within a reasonable time" thereafter. (5) Utah also in the alternative moves that the court amend its prior order by adding "the magic language" from 28 U.S.C. § 1292(b) so as to facilitate an interlocutory appeal from its December 4 decision.

The affidavits of the petitioners indicate that in February of 1969 attorneys for only six or seven thereof had ever discussed with Utah's attorney the possibility of a pipe antitrust suit against the defendants herein, or had relied upon the Utah class action to protect their interests.[1] Each of the petitioners alleges that the alleged conspiracy has continued to the date of the filing of the complaint by the State of Utah. All motions have been fully briefed and argued.

While Utah and petitioners allege that the "Western Pipe" conspiracy has continued on until May 13, 1969, the problem underlying all of the motions is that of the

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[1]These include the Metropolitan Water District of Salt Lake City, Salt Lake City, Salt Lake County Sanitary District, Salt Lake City Suburban Sanitary District, Central Weber Sewer Improvement District, City of Ogden, and Bona Vista, claiming that they have purchased some $5 million of pipe from the defendants or others during the period 1946-1964. Discovery in prior pipe litigation indicates that the relevant damage period for the alleged conspiracy was between 1954 and the end of 1962.

bar of the statute of limitations to the petitioners' complaints. Underlying every motion is the desire of the petitioners to avoid that bar by any procedural route. As determined by this court in Maricopa County v. American Pipe and Construction Co. et al., 303 F. Supp. 77 (D.Ariz. 1969), the tolling of the statute of limitations on the government's "Western Pipe" conspiracy cases ceased on May 24, 1969. Since only the State of Utah, of all the parties now before this court, filed its suit prior to that date, unless by one means or another the present parties can somehow get under the now dropped portcullis and inside the golden castle of the Clayton Act, any Sherman 1 claims for any injuries prior to the four years preceding the filing of these motions are barred.[2]

Motions to Intervene Under Rule 24.

Each of the petitioners urged that they should be permitted to intervene as a matter of right under Rule 24(a) (2), maintaining that they have such an interest relating to the conspiracy charged in the Utah action that the disposition of that action may impair or impede their ability to protect that interest. They urge

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[2]Anent the above, although petitioners have pled that the conspiracy continued on until May 13, 1969, not even Utah seems to take that portion of its complaint seriously. For all antitrust (money) purposes, the only evidence so far developed in the massive prior litigation involving the same alleged conspiracies indicate with almost absolute certainty that any such conspiracies terminated at least by the end of 1962. Digging into all Sherman 1 claims for the four years immediately prior to May 13, 1969 would, therefore, to an equally almost absolute certainty, produce nothing but a dry and expensive hole for the petitioners, with no monetary recovery whatsoever. (The court here is not prejudging; it is prognosticating.) While the court cannot foreclose the petitioners from the questionable pleasure of digging such a hole, it will here bypass that segment of petitioners' allegations.

the court should adopt the "liberalized" interpretation given this section by Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967); Smuck v. Hobson, 132 U.S. App.D.C. 372, 408 F.2d 175 (1969); and Nuesse v. Camp, 128 U.S.App.D.C. 172, 385 F.2d 694 (1967). While the advisory committee to the 1966 amendment in its note to subdivision (a) stated: "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should as a general rule, be entitled to intervene * * *.",[3] this court feels that Rule 24(a) (2) has been given its optimum application in *Cascade*. In *Cascade, Smuck* and *Nuesse,* each of the intervenors were attempting to implement important and well-defined public policies —a status not enjoyed by petitioners here.

It is only in those cases where the prospective intervenor appears to have a sufficient stake in the outcome and enough to contribute to the resolution of the controversy, that a right to intervene arises. Utah and petitioners admit that a judgment for or against Utah would in nowise preclude the petitioners or any of them from filing independent actions against the same defendants based upon the same alleged conspiratorial acts as set up by Utah. No decision in Utah's case would be res adjudicata as to any portion of their several causes of action. Thus, not one of the petitioners here has any real stake in the outcome of the Utah case, per se. Nor would their presence contribute to the resolution of Utah's claims. As indicated above, it is manifest that the underlying reason for the petitions to intervene is the desire of petitioners to get

[3]3B Moore's Federal Practice ¶24.01 [10].

their complaints related back to May 13, 1969, and thereby circumvent the bar of the statute of limitations.

The petitioners here manifestly have no such interest in the outcome of Utah's litigation as would mandate his court to permit them to intervene under Rule 24(a) (2).

The alternative, permissive intervention under Rule 24(b) (2), is not as easy of resolution. Petitioners' claims might well have questions of fact in common with Utah's—apparently the same parties-defendant, same alleged conspiracy, same time-damage periods, etc. It is manifest, however, that to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case.

The seven petitioners[4] who in their bare bones affidavits indicate some reliance on Utah's class action to toll the statute for them, find some support in dicta in Judge Fullam's excellently written decision in *Philadelphia Electric*,[5] viz., that those members of the non-class who relied upon the class action to protect their interest should be allowed to intervene and their actions relate back to the date the class action was filed, even though, meanwhile, the statute had run. It appears to this court, however, that within the limited context of violations of the antitrust laws, there is a very serious doubt as to the validity of any such

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[4]See n. 1.

[5]Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D.Pa. 1968).

holding on intervention in class actions as found in *Philadelphia Electric or Nisley*[6] under either Rule 23 or Rule 24. This doubt stems from 28 U.S.C. § 2072, the statute enabling the Supreme Court to make the present Rules of Civil Procedure. "Such rules shall not abridge, enlarge or modify any substantive rights * * *"

The courts that have permitted tolling of the statute by the filing of class actions in antitrust actions have consciously or otherwise entered into an "interest-balancing" approach to the problem.[7] Judge Frank, who in York v. Guaranty Trust Co.[8] said that "to hold that such noteholders [who were justified in believing that the plaintiffs' class action was begun on their behalf] cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule [Old Rule 23(a)(3)] into a trap", was but balancing off the interests of the parties. This same interest-balancing approach was considered by Judge Friendly in his concurring opinion in Escott v. Barchris Constr. Corp.,[9] in commenting on Judge Frank's "trap" argument in connection with an old spurious class action. The courts which have allowed class actions under the New Rule 23 to toll the statute in antitrust suits, likewise have taken an interest-balancing approach,[10] justifying the tolling in order to implement the congressional intent that the language of Clayton 5(b) must be given its broad-

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[6]Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1961), appeal dismissed sub nom., Wade v. Union Carbide, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1962).

[7]See 13 Villanova L.R. 370, 382.

[8]143 F.2d 503, 529 (2 Cir. 1944).

[9]340 F.2d 731, 735 (2 Cir. 1965).

[10]This same approach was also adopted by the majority under the old rule in *Union Carbide*, n. 6, 300 F.2d at 590.

est application in favor of enabling private litigants to reap every benefit that they possibly can in order to encourage the enforcement of antitrust laws by private litigation,[11] and in spite of verbal recognition of the substantive nature of the statute of limitations under §§ 4B and 5(b)[12] nevertheless have determined that when there is a conflict between implementing the Rules and implementing the antitrust statute of limitations policy balancing demands that the antitrust statute of repose must be violently disturbed by continued tolling—tolling solely authorized by judicial interpretation of Rule 23. This court is not satisfied that such interpretation is permissible under 28 U.S.C. § 2072.

In enacting the antitrust laws, Congress created a novel statutory right on behalf of plaintiffs, tortious and penal in nature, but stemming from no common law right, and providing that those injured by violations of these strictly American theory-of-economics statutes may recover treble damages plus cost of suit, and a reasonable attorney's fee. 15 U.S.C. § 15. Moreover, Congress has specially set up a four year statute of limitations for such antitrust actions, § 4B, and added on to to *all* conspirators even if some have settled out or

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[11] *Maricopa, supra,* 303 F.Supp. at 85. *Cf. also; Philadelphia Electric,* n. 5, 43 F.R.D. at 460, and State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 574 (D.C.Minn. 1968).

[12] *Philadelphia Electric,* n. 5, 43 F.R.D. at 460:
"Surely, it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right', 28 U.S.C. § 2072. The strong presumption of validity of these rules, Hanna v. Plumer, 380 U.S. 460, 461, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), requires this court to apply the rule as written * * *."

that statute an additional period during which the statute is tolled by the institution of a civil or criminal proceeding by the United States to prevent, restrain or punish violations of any of the antitrust laws. There is even further tolling because the courts have held[13] that as to 15 U.S.C. § 15b, the rule that fraudulent concealment tolls a statute of limitations "is read into every statute of limitations."

In even further encouragement and protection to antitrust plaintiffs, the courts have held that the institution of successive governmental actions under § 5(b), if filed while the statute is still tolled, continues the tolling process beyond the conclusion of prior government actions.[14] Moreover, the statute is not only tolled as to the defendants named in the government's actions, but it is also tolled as to all co-conspirators whether named in the actions or not,[15] and it remains tolled as otherwise concluded their case with the government.[16] All of these expanding constructions of the statute of limitations have been made within the context of the antitrust acts themselves.

In the instant case, the fraudulent concealment factors allegedly present, coupled with successive governmental actions and delayed settlement of the governments suits by only one of the present defendants has

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[13]Holmberg v. Armbrecht, 327 U.S. 392; 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946); Esplin v. Hirschi, 402 F.2d 94, 103 (10 Cir. 1968); Public Service Co. of New Mexico v. General Electric Co., 315 F.2d 306, 311 (10 Cir. 1963).

[14]*Maricopa, supra,* 303 F.Supp. at 86.

[15]Leh v. General Petroleum Corporation, 382 U.S. 54, 86 S.Ct. 203, 15 L.Ed.2d 134 (1965); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 354 (3 Cir. 1964), aff'd 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965).

[16]*Maricopa, supra,* 303 F.Supp. at 87.

carried back the period of defendants' potential liability to at least 1954 and tolled the statute for over six years following the government indictments of March 1964. If "the sole reason for [these tolling provisions] of the Clayton Act was to stimulate private antitrust suits * * * and aid such private suitors",[17] it would appear that this court has completely implemented congressional intent in these "Western Pipe" cases.

The policy behind the federal enactment of an antitrust statute of limitations with an accompanying statute on tolling was declared by Congress as follows:

> "This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.
>
> "There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefit of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To

[17] *New Jersey Wood Finishing*, n. 15, 332 F.2d at 354.

alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. *This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.*

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will *tend to shorten the period* over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency

of a Government antitrust proceeding, he *would be required to bring his action* either (a) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued." (Emphasis added.)[18]

"In addition to establishing a uniform statute of limitations, the bill strikes at *another* problem, flowing therefrom, namely, the tolling of such a statute. At the present time, the tolling of the statute, with respect to private treble damage suits, exists during the pendency of a suit by the United States. This period is continued by the present bill. However, in order that a person might not be deprived of the benefit of the Government suit because of an abrupt termination of the Government's litigation, the bill provides for extension of the tolling period not only for the duration of the Government suit but also for 1 year thereafter. Thus the injured parties are provided with an adequate time in which to take advantage of the Government's antitrust proceedings.

"There is an added precaution also provided for in this bill to prevent undue and lengthy prolongation of stale claims. By requiring a plaintiff to institute his suit either within 4 years from the date of injury or within 1 year after the final decree in a Government case, the plaintiffs will not be afforded time to procrastinate and delay." (Emphasis added.)[19]

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[18]S.Rep. No. 619, 6/21/1955 [To accompany H.R. 4954], 2 U.S.Cong. & Admin. News 1955, pp. 2332-2333.

[19]101 Cong.Rec. Part 4, p. 5130, 84th Cong. 1st Sess., Congressman Keating, House Committee on the Judiciary.

This court has previously said that when Congress enacted 15 U.S.C. § 16(b) tolling the 4-year statute of limitations of § 4B, it made it "manifest that in encouraging the enforcement of the antitrust laws by private litigation, tolling of the statute was more important than the repose established thereby."[20] That statement may be utilized only within the context of the interpretation of the extent of tolling permitted by 15 U.S.C. § 16(b), not as an inference of the application of Rule 23 to that section.

Any "interest-balancing" approach is inapplicable in this antitrust action if either the statutory bar of § 4B (15 U.S.C. §15b) or § 5(b) (15 U.S.C. § 16(b)) created a substantive right for antitrust defendants. This problem of rights created by statute, which gives the right of action and also fixes the time within which such action may be brought, was fully considered by Chief Justice Waite in The Harrisburg, 119 U.S. 199, 214, 7 S.Ct. 140, 147, 30 L.Ed. 358 (1886), where, in determining if a suit *in rem* could be brought in admiralty under a state statute permitting recovery of damages for wrongful death on navigable waters which also fixed the time within which such action might be brought, wrote:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the

[20] *Maricopa, supra,* 303 F.Supp. at 85.

right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

This same rule was invoked in Ragan v. Merchants Transfer Co., 337 U.S. 530, 533, 69 S.Ct. 1233, 1235, 93 L.Ed. 1520 (1949), where Justice Douglas said of a state law and its statute of limitations vis-a-vis Rules 3 and 4:

"Since that cause of action is created by local law, the measure of it is to be found only in local law. * * * It accrues and comes to an end when local law so declares. * * *

"We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. * * *

"It is argued that the Kansas statute in question is not an integral part of the Kansas statute of limitations. But the Court of Appeals * * * has held to the contrary." (Footnote omitted.)[21]

Judge Learned Hand in Bomar v. Keyes, 162 F.2d 136, 138, 140 (2 Cir. 1947), in also considering the

[21]This court does not view Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), as disturbing the above statement of applicable law.

statute of limitations in relation to Rules 3 and 4, covered the obverse:

> "We [here] have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. * * * and when a right is not so conditioned the statute of limitations is treated as going to the remedy."

If the analyses of Justices Waite and Douglas and Judge Learned Hand on the bar of limitations in the context of rights created by statute are valid, then within the purview of the § 5(b) at least, any enlargement of tolling of that statute by virtue of the Rules cannot rationally be categorized as procedural!

The substantive-procedural dichotomy does not present a completely new problem. It has been considered by other courts but in connection with the effect of the doctrine of fraudulent concealment on § 4B. *E.g.*, Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 282 (8 Cir. 1962); Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2 Cir. 1962); Public Service Co. of New Mexico, *supra*, n. 13. Each court held that Holmberg, *supra*, 327 U.S. at 397, 66 S.Ct. at 585, 90 L.Ed. 743, reads the principle that fraudulent concealment of a cause of action tolls a statute of limitations "into every federal statute of limitation", and since Congress did not provide to the contrary by unambiguous language, the rule applied to § 4B.[22] This rule appears now to be too well settled for dispute.[23]

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[22]This court has not ignored the carefully prepared and documented opinion of Judge Mathes in the *Kansas City, Missouri* case. As indicated above, the problem presented to that court, however, was not within the context of enlarging the antitrust

(This footnote is continued on next page)

Tolling of §§ 4B and 5(b) and the Enabling Acts

By judicial equitable fiat, § 4B is tolled by fraudulent concealment. By the legislative ukase of § 5(b), it is further tolled by government suit. In the context of the facts of this case, plaintiff would have the tolling period specified by § 5(b) additionally tolled by virtue of the Rules of Civil Procedure.

The Enabling Acts (28 U.S.C. §§ 2072, 2074, civil and bankruptcy rules; and 18 U.S.C. § 3771, criminal rules) confer rule-making power to the Court only over procedure and not substance. The test, as stated in Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1940), is "whether a rule really regulates procedure, * * * the judicial process for enforcing rights or duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." If Congress had but enacted § 4B to take the place of the hodge-podge of state statutes of limitation and omitted § 5(b), the substantive-procedural rationale of *Kansas City, Missouri* would have more valdity. When, however, with no state statutes or common law precedent before it, Congress in § 5(b) created new and specific tolling conditions and periods, and unequivocally *"Provided, however"*, that when the statute of limitations was suspended there-

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tolling period of § 5(b) by virtue of the Federal Rules of Civil Procedure, but rather an enlargement of § 4B by virtue of equitable doctrine against fraudulent concealment. This court, however, finds the *entire* Congressmen Murray-Quigley discourse concluding without anything genuinely definitive having been *agreed* upon. This court, like Judge Moore in *Atlantic City Electric Co., supra,* 312 F.2d at 243-244, believes that Chairman Celler and the Committee reports more accurately state congressional definition and intent of both §§ 4B and 5(b).

[28]Atlantic City v. General Electric Co., supra, was a 6 to 1 *en banc* opinion.

under, "any action * * * shall be forever barred unless commenced either [within the period of suspension or] within four years after the cause of action accrued", the validity of comparing state-federal statutes of limitation[24] within the milieu of substantive-procedural rights becomes questionable. In § 5(b) Congress not only created new rights for antitrust plaintiffs but also clearly created obverse rights for antitrust defendants.

It is not necessary for this court to determine whether or not the doctrine in *York*, *Hanna* and *Sibbach*, *supra*, would here control. From its legislative history this court can only conclude that in enacting §§ 4B and 5(b) together with a unique tolling statute, Congress enmeshed into the Clayton Act its own statute of limitations applicable only to equally unique antitrust causes of action and calculated to give what Congress said was sufficient time for any aggrieved parties to discover violations, gain all the benefits they could from federal actions thereon, and file their own complaints. Specifically tailored as they were for antitrust litigation, this court cannot but determine that § 5(b) certainly, and § 4B rationally, were intended by Congress to become an integral part of the entire antitrust legislative scheme.

It thus appears to this court that the only statutory "right" given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F. R.Civ. P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to additionally toll § 5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right.

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[24] *Kansas City, Missouri, supra*, 310 F.2d at 282.

As the Court stated in Holmberg v. Armbrecht,[35] *supra:* "Traditionally and for good reasons, statutes of limitation are not controlling measures of *equitable* relief", and "a suit in *equity* may lie though a comparable cause of action at law would be barred." (Emphasis added.) That same Court also said: "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."[36]

This is not an equitable action nor do any equities appear for any petitioners. As stated above, all have regularly retained counsel. The attorneys for the "relying seven" are, presumably, no country squires, but rather, sophisticated "big city" counsel, under constant retainer as such by moneyed clients. Nothing appears in any of their affidavits to indicate why they should have "relied" on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that Utah's attorneys planned to file a class action.

This court can but conclude that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended.

The above conclusion carries even more thrust here, where this court has determined that the action may not be maintained as a class action. The class action, in

[35]327 U.S. at 396, 66 S.Ct. at 584.
[36]327 U.S. at 395, 66 S.Ct. at 584.

the words of the Committee,[27] has been "stripped of its character as a class action." Since there never was a class, the members of the "class" cannot claim that they started their suits, vicariously, before the tolling period expired. There being no class, there is no connecting link available, even for the "relying seven", for attachment of any "relation back" hook.

Leave to intervene, with relation back of their actions to May 13, 1969, is therefore DENIED to *all* 60-odd intervenors-petitioners.

(2) Motion for Leave to Amend and Add Co-parties Plaintiff

The object of Utah's alternative (2) motion for leave to amend and add intervenors as co-parties plaintiff under Rule 15, too, is to get the intervenors' (as additional parties) complaints related back to May 13, 1969, and "under the portcullis." While Rule 15(c) permits an amendment changing a party *against* whom a claim is asserted, under certain circumstances, to relate back—if the statute has not run, the Advisory Committee Notes of 1966 state:

> "The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[28]

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[27]Committee on Rules of Practice and Procedure.

[28]3 Moore's Fed.Practice 15.01 [9], p. 811.

A new party-plaintiff cannot be added by amendment after the statute has run.[39] This motion too must be denied.

(3) Motion to Reinstate Class Action

Utah's alternative motion (3) is that this court alter its order of December 4, 1969, under Rule 23(c) (1), F.R.Civ.P., to reinstate a class action, just for the present petitioners. Nothing contained in Utah's moving papers adds any new element or basis upon or from which this court would feel itself either impelled or compelled to change either its findings, conclusions or decision of December 4. The fact that the states of Wyoming, Idaho and Nevada and the public bodies therein who have purchased pipe during the relevant years of the "Western Pipe Conspiracy" appear in this alternative motion to have been abandoned by Utah, also in no wise changes any basis of this court's December 4, 1969 decision. This third alternative is likewise DENIED.

(4) Motion to Vacate Court's Non-Class Order and Permit Intervention Relating Back

Utah's alternative motion (4) is that the court vacate its December 4 order of non-class suit, direct that notice be given to the some 800 "class members" of this court's decision of "non-class action" and permit those who want to, to intervene within a reasonable time, with their intervention relating back to May 13, 1969. While Utah urges that "Fairness and due process

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[39]Iocono v. Anastasio, 79 F.Supp. 378 (S.D.N.Y.1918); Aarhus Oliefabrik A/S v. A. O. Smith Corp., 22 F.R.D. 33 (E.D.Wis.1958); Murfkan v. Kahn, 11 F.R.D. 520 (S.D.Fla. 1951); Messelt v. Security Storage Co., 14 F.R.D. 507 (D.Del. 1953); Kerner v. Rackmill, 111 F.Supp. 150 (M.D.Pa.1953).

require that at the very least the class members be given notice of the court's decision and a reasonable opportunity to join in this action",[30] Utah bypasses the fact that defendants as well as plaintiff have equal rights to "fairness and due process." This court has already determined the due process aspects of the case. Leaden procrastination and delay in filing their own complaints on the part of "class members" may not here, *ipso facto*, be transmuted into golden participation by the emotional wand of "fairness". This motion is but another attempt to evade the statutory bar. Unfortunately for plaintiff, for the reasons heretofore set forth it too fails, and the motion is DENIED.

(5) Motion for Certification for Interlocutory Appeal

As a last motion (5), Utah asks that this court's order of December 4, 1969, be certified for interlocutory appeal.

This court is not prepared so to act, at this time at least. It did not in December last, nor does it now feel, that on the facts before it there is any substantial ground for a difference of opinion as to how this antitrust case should be treated or handled. Utah, having filed its claim in time, will have its day in court. All governmental bodies in the alleged "class" who may feel themselves injured by any alleged "Western Pipe" conspirators, have had over six years within which to seek redress, jointly or severally. Each has at all times been represented by counsel; many of the cities and water and sewer districts have operating budgets in the 7 to 9 figure dollar bracket. All are—or should be—sophisticated in both competitive bidding practices as well as litigation. No "creditors' bill" situations are here

[30]Plaintiff's Memorandum in Support of Motions, p. 15.

involved. All of those factors as well as more went into and compelled this court's decision of December 4, 1969.

The motion must be DENIED.

As the pleadings now stand, since petitioners have *alleged* a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases. If, however, petitioners claims were limited to pre-December 12, 1964 transactions, different legal aspects would arise.

Defendants will prepare the necessary order.

DATED: Honolulu, Hawaii, this 26 day of March, 1970.

/s/ Martin Pence
United States District Judge

Entered March 30, 1970.

Intervenors' Amended Complaint [Proposed].

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

Intervenors, and each of them, by their attorneys, hereby amend their proposed Intervenors' Complaint in the following and only in the following regard:

Paragraph 24 of Intervenors' Proposed Complaint is amended to read as follows:

> Beginning prior to the year 1954 in the case of concrete pipe and prior to the year 1958 in the case of steel pipe and probably as far back as 1946 in both cases and continuing, so far as Intervenors know, up and to a date four years preceding the date of filing of this complaint, the defendants and co-conspirators engaged in an unlawful combination and conspiracy to eliminate competition and stabilize and maintain the prices of the herein defined types of pipe, thereby restraining the hereinabove-described trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended 15 U.S.C. Section 1, commonly known as the Sherman Act.

This amendment shall be effective as of the original filing date of Intervenors' Proposed Complaint.

DATED this 19th day of June, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
Kent Shearer
By /s/ Denis R. Morrill
Special Assistant Attorneys
General State of Utah
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206 El Paso Natural Gas Bldg.
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Findings of Fact, Conclusions of Law, and Order on Motions to Intervene and to Amend.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. 69-1964-MP.

The Court on December 4, 1969, filed its Order that this action shall not be maintained as a class action. Subsequently, some sixty towns, cities, and other governmental subdivision and entities in the State of Utah moved, pursuant to Rule 24(a)(2), or in the alternative pursuant to Rule 24(b) (2) F.R.C.P., to intervene as plaintiffs herein, and plaintiff moved pursuant to Rule 15 F.R.C.P., for leave to amend its Complaint by adding the aforesaid petitioners as parties plaintiff or, in the alternative, that the Court alter or amend its Order of December 4, 1969, pursuant to Rule 23(c)(1), F.R.C.P., so as to reinstate this as a class action as to those same petitioners; plaintiff also moved as another alternative, for an order directing that notice be given to all members of the class alleged in plaintiff's original Complaint advising them of the decision of the Court to terminate the class action and then giving the members of the "class" a reasonable time in which to intervene in the present action and that the Court's Order of December 4, 1969, be vacated pending such notice and intervention "within a reasonable time" thereafter; and, further, that the Court amend its prior Order to permit an interlocutory appeal from the prior Order of December 4, 1969.

The plaintiff and defendants having adduced evidence with respect thereto, and the Court being fully advised in the premises, makes the following findings of fact and conclusions of law:

1. All governmental bodies in the alleged "class" who may feel themselves injured by any alleged "Western Pipe" conspirators had over five years from at least March 10, 1964, to May 23, 1969, to seek redress, jointly or severally. Each has at all times been represented by counsel. No "Creditors' bill" situations are here involved.

2. No more than seven of petitioners ever discussed with plaintiff's attorney the possibility of a pipe antitrust suit against the defendants herein. Nothing appears in any of their affidavits to indicate why they should have "relied" on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that plaintiff's attorneys planned to file a class action. None of the petitioners moving to intervene were entitled to rely upon such action as a class action.

3. The Court finds further that there is insufficient showing by any of the aforesaid petitioners that they properly relied upon the purported class action brought by the State of Utah; and the Court, therefore, finds that none of such parties did in fact rely upon such action as a class action.

4. The granting of any of the aforesaid motions to intervene or to amend the Complaint would violate the rights of defendants to fairness and due process.

5. The tolling of the statute of limitations based upon the government actions pleaded in Paragraph VIII of the Utah Complaint, which tolling is also pleaded in each of the proposed causes of action by each of the parties moving to intervene herein, ceased on May 24, 1969; and insofar as any of the proposed causes of action by said parties moving to intervene herein is based upon the aforesaid government actions pleaded in Paragraph VIII of the Utah Complaint, such action is barred by the applicable statute of limitations.

6. There never was a class within the meaning of Rule 23, F.R.C.P., as alleged in the Complaint herein, and the members of the purported "class" described herein cannot claim that they started their suits, vicariously, before the tolling period expired.

7. The Court's Order of December 4, 1969, does not involve a controlling question of law as to which there is a substantial ground for difference of opinion.

8. The applicants have, by amendment to their proposed complaint, limited their allegations of conspiracy to a date four years preceding the time of filing. Accordingly, a final order may be entered against applicants for intervention.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Each of the aforesaid motions of the petitioners to intervene and the motions of plaintiff to amend the Complaint is hereby denied; that is to say, the motions for leave to intervene pursuant to Rule 24, F.R.C.P. and Rule 21, F.R.C.P.

2. Each of the motions of plaintiff to vacate the Court's Order of December 4, 1969, and to reinstate the class action is in all respects denied.

3. The motion of plaintiff that the Court's Order of December 4, 1969, be certified for interlocutory appeal pursuant to Section 1292(b) of Title 28, U.S.C., is hereby denied.

DATED: June 23, 1970.

/s/ Martin Pence

United States District Court Judge

Filed June 23, 1970.
Entered July 8, 1970.

Notice of Appeal.

United States District Court, Central District of California.

State of Utah, et al. Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

Notice is hereby given that Weber Basin Water Conservancy District, Salt Lake County Water Conservancy District, Salt Lake City Suburban Sanitary District No. 1, Salt Lake City Suburban Sanitary District No. 2, Bountiful Water Subconservancy District, Bona Vista Water Improvement District, Central Weber Sewer Improvement District, Granger-Hunter Improvement District, Metropolitan Water District of Salt Lake City, Central Davis County Sewer District, North Davis County Sewer District, Sandy Suburban Improvement District, South Davis County Sewer Improvement District, South Davis County Water Improvement District, South Ogden Conservation District, Taylorsville-Bennion Improvement District, Weber-Box Elder Conservation District, Salt Lake County, Salt Lake City, Ogden City, Provo City, City of South Ogden, City of Logan, City of Kaysville, City of Layton, City of West Jordan, City of Vernal, City of Salem, City of Springville, City of Payson, City of Oak City, City of North Salt Lake, City of Myton, City of Murray, City of Mt. Pleasant, City of Monticello, Town of Minersville, City of Midvale, City of Manti, City of Lehi, Town of Levan, Town of Huntsville, City of Helper, City of Garland, City of Fillmore, City of Clearfield, City of Castledale, City of Nephi, Town of West Point, City of Blanding, applicants for intervention above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that

part of the order entered in this action on the 8th day of July, 1970 which denied said applicants' motion for leave to intervene as plaintiffs.

Dated this 31st day of July, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
Kent Shearer
By /s/ Gerald R. Miller
Special Assistant Attorneys
General State of Utah
Attorneys for Plaintiff and
Applicants for Intervention
206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

Filed August 4, 1970.

[Endorsement omitted in printing]

Motion to Extend Time for Appeal.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants, Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil No. 69-1964-MP.

Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella, applicants for intervention, move the Court for an order enlarging until September 8, 1970 the period within which applicants for intervention may appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on the 8th day of July, 1970 on the ground of excusable neglect based upon the failure of these applicants for intervention to learn of the omission of their names as listed appellants in the notice of appeal filed herein on July 6, 1970. These applicants for intervention understood and intended that their names be included in said notice of appeal and did not learn of the inadvertent omission of said names until the 20th day of August, 1970, as more particularly shown by the affidavits of Gerald R. Miller, Denis R. Morrill and Connie Wilson attached hereto.

Dated this 25th day of August, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
Kent Shearer
By /s/ Gerald R. Miller
Special Assistant Attorneys
General State of Utah
Attorneys for Plaintiff and
Applicants for Intervention
206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

ATTACHMENT TO MOTION TO EXTEND TIME FOR APPEAL

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT OF GERALD R. MILLER

[Jurat omitted in printing]

GERALD R. MILLER, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys for plaintiff and the applicants for intervention in the above-entitled case.

2. After receipt of the Court's opinion dated March 26, 1970, I attempted to contact the applicants for intervention in order to advise them of the order which would be entered denying their motion for intervention and in order to review the status of the case with them so that a decision could be made on the course of action which would be pursued by the applicants.

3. The majority of the applicants subsequently decided to amend paragraph 4 of the intervenors' proposed complaint so as to limit their allegations of conspiracy to a date four years preceding the time of the filing. Following this amendment and on July 8, 1970, the Court entered its findings of fact, conclusions of law and order on motions to intervene and to amend. It is the desire of the majority of the applicants for intervention to appeal to the United States Court of Appeals for the Ninth Circuit from that part of the order which denied the motion for leave to intervene as plaintiffs.

4. On July 6, 1970 a notice of appeal was filed herein. It was my intent as counsel for the appellants

to appeal on behalf of all of the applicants for intervention except those which had specifically indicated that they did not wish to pursue this matter further. Accordingly, I directed my secretary to include the name of each applicant for intervention other than those which had contacted my office to the contrary.

5. On the afternoon of August 20, 1970 in the course of preparing an agreed statement on appeal pursuant to Rule 10(d) of the Federal Rules of Appellate Procedure, I discovered for the first time that the names listed as appellants on the notice of appeal filed July 6, 1970 failed to include five of the applicants for intervention which desire to be included in the appeal. In checking with my office staff, I determined that the names on said notice of appeal had been proofread against the original motion to intervene dated December 11, 1969, in which some 64 lesser entities of the State of Utah moved for intervention. The five additional entities which wish to join in the appeal were brought before the Court in a motion to intervene dated December 29, 1970. Accordingly, the omission of these five names from the notice of appeal was not detected.

6. It is the intention of Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella to appeal from the Court's ruling. It was my intention as counsel for the applicants for intervention to include these five entities along with the other 64 entities as appellants listed on the notice of appeal. The absence of their names from the notice of appeal filed on July 6, 1970 is due to inadvertence and excusable neglect.

7. The file on this case which is maintained in my office is extensive and includes many hundreds of docu-

ments. Due to the large number of applicants for intervention, it has been difficult for my staff to prepare pleadings in which every applicant is listed in the case heading. We have done our best to check each pleading to insure that all of the names were listed correctly. The omission of five entities from the notice of appeal filed July 6, 1970 was a mechanical error which we failed to detect.

8. Under all of the circumstances, I feel that the omission constitutes excusable neglect. Accordingly, I have filed a notice of appeal with the above-entitled Court on behalf of the five applicants for intervention which were inadvertently omitted from the first notice of appeal. I have also filed a motion with the Court praying for enlargement of the period within which a notice of appeal may be filed.

Further affiant sayeth naught.

/s/ Gerald R. Miller

Executed August 25, 1970.

[Notarial Acknowledgment omitted in printing]

ATTACHMENT TO MOTION TO EXTEND TIME FOR APPEAL

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT OF DENIS R. MORRILL

[Jurat omitted in printing]

DENIS R. MORRILL, being first duly sworn, deposes and states as follows:

1. I am an attorney associated with the firm of Mulliner, Prince & Mangum. The firm of Mulliner, Prince & Mangum was retained by the State of Utah to prosecute this action and later by a number of governmental entities to prosecute their motions to intervene. After denial of the motions to intervene, many of the intervenors decided to appeal that denial.

2. A notice of appeal was prepared for these intervenors by a member of this firm, and it was given to me to make a final check to assure that those intervenors which wanted to appeal were listed on the notice. I checked the records in the files and; along with a secretary, determined that the notice of appeal contained all of the intervenors which wanted to appeal from the denial of the motion to intervene dated December 11, 1969.

3. In checking the names of intervenors to be included on the notice of appeal, through inadvertence on my part, I failed to check the motion to intervene

dated the 29th day of December, 1969 wherein five additional intervenors moved to intervene. Thus, while these five intervenors whose motion had been denied wished to appeal, their names were not included on the notice of appeal filed July 6, 1970.

4. I just became aware of the omission of these names on August 20, 1970 when I was so informed by Gerald R. Miller.

Further affiant sayeth naught.

/s/ Denis R. Morrill

Executed August 25, 1970.

[Notarial Acknowledgment omitted in printing]

ATTACHMENT TO MOTION TO EXTEND TIME FOR APPEAL

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT OF CONNIE WILSON

[Jurat omitted in printing]

CONNIE WILSON, being first duly sworn on oath, deposes and says:

1. I am employed by the firm of Mulliner, Prince & Mangum as a legal secretary. In such capacity I have assisted in the secretarial work involved in the above-entitled case for the last year and a half.

2. In July of 1970 I typed the notice of appeal which was filed with the Court on July 6, 1970. In connection with the preparation of said notice of appeal, I was instructed to check the name of each appellant carefully in order to insure that all of the entities which wished to appeal were included on the notice of appeal. I proofread all of the names on the notice of appeal to the best of my ability and concluded that each of the parties desiring to appeal were listed thereon.

3. Subsequently, on August 20, 1970 I discovered for the first time that I had inadvertently omitted five names from the notice of appeal. These names were included on a motion to intervene filed approximately one month following the original motion for interven-

tion. The omission occurred because the notice of appeal filed July 6, 1970 was proofread against the original motion for intervention. At the time I checked the notice of appeal I was not aware of the subsequent motion for intervention dated December 29, 1970. It was my intent to insure that each of the applicants for intervention which desired to join in the appeal were included and listed on the notice of appeal. Five entities were omitted through inadvertence and oversight.

Further affiant sayeth naught.

/s/ Connie Wilson

Executed August 25, 1970.

[Notarial Acknowledgment omitted in printing]

Notice of Appeal.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants, Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil. No. 69-1964-MP.

Notice is hereby given that Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella, applicants for intervention in the above-entitled case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the order entered in this action on the 8th day of July, 1970 which denied said applicants' motion for leave to intervene as plaintiffs.

Dated this 25th day of August, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
Kent Shearer
By /s/ Gerald R. Miller
Special Assistant Attorneys
General State of Utah
Attorneys for Plaintiff and
Applicants for Intervention
206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

Order Extending Time Within Which to Appeal.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants. Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil No. 69-1964-MP.

Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella, applicants for intervention in the above entitled case, having filed their motion dated August 25, 1970 for an order pursuant to Rule 4(a) of the Federal Rules of Civil Procedure extending time within which to appeal; and notice of said motion having been given to all counsel of record in a manner deemed appropriate by this Court; and it appearing that said applicant's failure to appeal within the expiration time is due to excusable neglect based on the failure of said applicants to learn of the omission of their names as listed appellants in the notice of appeal filed herein on August 4, 1970, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED that Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella are hereby granted an extension of time to and until September 6, 1970 within which to file a notice of appeal in the above entitled case. The notice of appeal dated August 25, 1970 and lodged with the Court August 26, 1970 is hereby validated and the same is deemed to be filed timely.

DATED this 2nd day of September, 1970.

/s/ Martin Pence
United States District Court Judge

Agreed Statement on Appeal Pursuant to Rule 10(d) of the Federal Rules of Appellate Procedure.*

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants, Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil No. 69-1964-MP.

1. On March 10, 1964, a United States grand jury in the Southern District of California, Central Division, returned five indictments, copies of which, marked Exhibit A [R. 8-46], are attached hereto and incorporated herein. Each of said indictments named certain individual defendants and two or more of the following corporate defendants: American Pipe and Construction Company, United Concrete Pipe Corporation, United States Steel Corporation, Kaiser Steel Corporation, Smith Scott, Inc. and U.S. Industries, Inc. Each of the indictments charge the defendants named therein with combining and conspiring together in restraint of interstate trade in a specified product line of steel and/or concrete pipe in violation of 15 U.S.C. § 1 (Sherman 1), in that they submitted collusive and rigged bids for the sale of such pipe and allocated and divided business among themselves.

2. On June 19, 1964, pleas of *nolo contendere* were tendered by said defendants, accepted by the court, and judgments were entered thereon. No appeals were taken therefrom and none could be taken since such judgments were entered pursuant to consent of

[*Note: Exhibits to this Agreed Statement on Appeal are omitted in printing and references are made to the Record on Appeal.]

the parties. Copies of such judgments, marked Exhibit B [R. 48-68], are attached hereto.

3. On June 23, 1964, the United States filed five civil actions in the United States District Court for the Southern District of California, Central Division, against various of said defendants, each such action relating to a specified product line of steel and/or concrete pipe. In these five government civil actions, the United States predicated the complaints upon 31 U.S.C. §§ 231-233 (False Claims Act) and 15 U.S.C. § 15(a) (Clayton 4A), none of which actions could invoke the tolling provisions of § 5(b) of the Clayton Act. The civil complaints were based on facts uncovered by the government in preparing its criminal indictments. Copies thereof, marked Exhibit C [R. 70-134], are attached hereto and incorporated herein.

4. On October 28, 1964, the government amended each of its five complaints by adding a new count under 15 U.S.C. § 4 seeking to restrain continuing violations by the defendants named therein of § 1 of the Sherman Act. Copies of such amended complaints, marked Exhibit D [R. 136-228], are attached hereto and incorporated herein.

5. On December 8, 1967, each of the defendants, excepting American Pipe and Construction Company, entered into consent decrees in each of the government civil cases in which they were respectively named as defendants. Copies of such judgments, marked Exhibit E [R. 230-84], are attached hereto and incorporated herein.

6. On May 24, 1968, a "final judgment" was entered against American Pipe and Construction Company in each of the three government cases in which it had

been named as a defendant. Copies of such judgments, marked Exhibit F [R. 286-315], are attached hereto.

7. On May 13, 1969 the State of Utah filed its complaint in the above-entitled action in the United States District Court for the District of Utah. A copy of the complaint is labeled Exhibit G [R. 317-40] and attached hereto. The complaint was filed against all of the corporate defendants named by the United States in its proceedings and in addition against Utah Concrete Pipe Company and W. R. White Company. The State of Utah brought the above-entitled action on behalf of itself and all of its lesser governmental entities who were end users of pipe acquired from the defendants, co-conspirators and others. Further, the class alleged in the complaint was broad enough to include all other states in the "Western Area" as therein defined which had not previously filed a similar action, either on their own behalf or as members of a previous class action, and included their lesser governmental entities.

8. By order filed August 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the State of Utah case to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407.

9. On November 14, 1969, the defendants moved the Court for an order determining that the action should not be maintained as a class action. A copy of said motion, marked Exhibit H [R. 342-44], is attached hereto and incorporated herein. Defendants' mo-

tion came on for hearing before the Court on December 1, 1969.

10. On December 4, 1969, the Court entered its findings of fact and order respecting the class action. A copy thereof, marked Exhibit I [R. 346-47], is attached hereto and incorporated herein. A copy of the Court's opinion, marked Exhibit J [R. 349-57], is attached hereto and incorporated herein.

11. On December 12, 1969, and December 29, 1969, some 69 lesser governmental entities of the State of Utah filed motions to intervene as plaintiffs. Copies of said motions, together with the proposed complaint in intervention attached thereto and affidavits filed in support thereof, marked Exhibit K [R. 359-438], are attached hereto and incorporated herein. On March 9, 1970, a hearing was had before the Court on said motions. Subsequently, the applicants for intervention amended paragraph 24 of the intervenor's proposed complaint so as to limit their allegations of conspiracy to a date four years preceding the time of filing. A copy of said amendment, marked Exhibit L [R. 440-41], is attached hereto and incorporated herein.

12. On July 8, 1970, the Court entered its findings of fact, conclusions of law and order on motions to intervene and to amend. A copy of the same, marked Exhibit M [R. 443-45], is attached hereto and incorporated herein. In said order the Court denied the motions of the applicants to intervene. A copy of the Court's opinion, marked Exhibit N [R. 447-65] is attached hereto and incorporated herein.

13. Exhibit O [R. 467-69] is the Notice of Appeal filed herein dated July 31, 1970. The appellants appeal from the findings of fact, conclusions of law and order entered on July 8, 1970, denying their motions to intervene.

14. In addition to the record heretofore attached as exhibits hereto, the following portions of the record are also attached as exhibits hereto:

Memorandum in Support of Motions Filed by Plaintiff and Applicants for Intervention	Exhibit P [R. 471-88]
Points and Authorities of Defendants in Opposition to Motions to Intervene and to Amend	Exhibit Q [R. 490-521]
Affidavit of Haldor T. Benson in Support of Points and Authorities of Defendants in Opposition to Motions to Intervene and to Amend	Exhibit R [R. 523-34]
Request for Admission, filed by defendant United States Steel Corporation and dated 1/22/70	Exhibit S [R. 536-42]
Affidavit of Oliver F. Green in Opposition to Motion to Intervene as Plaintiffs or in the Alternative, to Amend the Complaint to Add Additional Parties and *Memorandum on Behalf of Defendant United States Industries in Opposition to Motion to Intervene or in the Alternative to Amend the Complaint to Add Additional Parties*	Exhibit T [R. 544-57]

Memorandum of Defendant Kaiser Steel Corp. in Opposition to Motion to Intervene, to Amend and to Add Additional Parties	Exhibit U [R. 559-64]
Affidavit of Dominic B. King	Exhibit V [R. 566-69]
Affidavit of Amos Clements of 2/6/70	Exhibit W [R. 571-72]
Supplemental Memorandum of Utah Concrete Pipe Company in Opposition to Motions to Intervene and Amend	Exhibit X [R. 574-79]
Memorandum of Plaintiff and Applicants for Intervention in Reply to Defendants' Memoranda in Opposition	Exhibit Y [R. 581-94]
Motion to Extend Time of Appeal together with *Affidavits* in Support Thereof	Exhibit Z [R. 596-604]
Notice of Appeal dated August 25, 1970	Exhibit ZA [R. 606]
Order Extending Time Within Which to Appeal	Exhibit ZB [R. 608]
Summary of Dates	Exhibit ZC [R. 610-14]

15. The question presented on appeal is "Did the Court err in denying the aforesaid motions to intervene?"

The parties hereto, through their respective counsel, hereby agree that the foregoing statement of the case contains those facts which they consider to be essential to a decision of the question involved by the United States Court of Appeals for the Ninth Circuit.

Dated this 4th day of September, 1970.

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JESSE R. O'MALLEY
for Defendants-Appellees

The foregoing statement is hereby approved this 17th day of September, 1970.

/s/ Martin Pence
United States District Court Judge

Filed September 21, 1970.

United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

SUMMARY OF DATES

Date	Event	Page Number
1954 to a date four years preceding the filing of the complaint	Complaint Period	1 [R. 611]
March 10, 1964	Return of Five Indictments Upon Which Utah Complaint is Based	1 [R. 611]
June 19, 1964	Criminal Cases Terminated With Judgments on Nolo Pleas	2 [R. 612]
June 23, 1964	Five Civil False Claims Actions Instituted by United States of America	2 [R. 612]
October 28, 1964	Amended Complaints Filed by United States of America to Prevent and Restrain Violations of Sherman Act	3 [R. 613]
December 8, 1967	Consent Decrees Entered in Civil Actions as to All Defendants Except American Pipe and Construction Co.	3 [R. 613]
May 27, 1968	American Pipe and Construction Co. Enters into Consent Decrees	4 [R. 614]
December 8, 1968	One Year After Consent Decrees Entered in Civil Actions as to all Defendants Except American Pipe and Construction Co.	

Date	Event	
May 13, 1969	Complaint Filed by State of Utah	4 [R. 614]
December 12, 1969	Motion to Intervene as Plaintiffs	4 [R. 614]
1954 to a date four years preceding the filing of the complaint	Complaint period	
March 10, 1964	Return of Five Indictments (Southern District of California, Central Division 1964) upon Which Utah Complaint is based:	

1. United States of America
   v.
   American Pipe and Construction Co., and certain individuals; United Concrete Pipe Corp.; and certain individuals
   (Criminal No. 33338)
   Concrete Pipe

2. United States of America
   v.
   Kaiser Steel Corporation; United States Steel Corporation; and certain individuals
   (Criminal No. 33339)
   Steel Large Diameter Pressure Pipe

3. United States of America
   v.
   United Concrete Pipe Corp.; American Pipe and Construction Co.; Kaiser Steel Corporation; United States Steel Corporation; and certain individuals
   (Criminal No. 33340)
   Alternate Large Diameter Pressure Pipe

4. United States of America
   v.
   U.S. Industries, Inc.; American Pipe and Construction Co.; Smith-Scott, Inc.; United Concrete Pipe Corp.; United States Steel Corporation; and certain individuals
   (Criminal No. 33341)
   Alternate Small Diameter Pressure Pipe

Date	Event
	5. United States of America v. United States Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc.; and certain individuals *(Criminal No. 33342)* Steel Small Diameter Pressure Pipe
June 19, 1964	Criminal Cases Terminated With Judgments on Nolo Pleas
June 23, 1964	Civil Actions Instituted (Southern District of California for the Central Division, 1964) by United States of America Pursuant to False Claims Act (31 U.S.C. §§ 231-233) and Alternately Pursuant to Section 4A of the Clayton Act (15 U.S.C. § 15a):
	1. United States of America v. American Pipe and Construction Co.; United Concrete Pipe Corp. *(Civil No. 64-832)* Concrete Pipe
	2. United States of America v. Kaiser Steel Corporation; United States Steel Corporation *(Civil No. 64-833)* Steel Large Diameter Pressure Pipe
	3. United States of America v. United Concrete Pipe Corp.; Kaiser Steel Corporation; American Pipe and Construction Co.; United States Steel Corporation *(Civil No. 64-834)* Alternate Large Diameter Pressure Pipe
	4. United States of America v. U.S. Industries, Inc.;

Date	Event
	Smith-Scott Co. Inc.; United States Steel Corporation; American Pipe and Construction Co.; United Concrete Pipe Corp. *(Civil No. 64-835)* Alternate Small Diameter Pressure Pipe
	5. United States of America v. United States Steel Corporation; Smith-Scott, Co., Inc.; U.S. Industries, Inc. *(Civil No. 64-836)* Steel Small Diameter Pressure Pipe
October 28, 1964	Amended Complaints Filed by United States of America to Add Claim Pursuant to Sections 1 and 4 of the Sherman Act (15 U.S.C. §§ 1, 4) to Prevent and Restrain Violations of Sherman Act
December 8, 1967	Consent Decrees Entered in Civil Actions as to All Defendants Except American Pipe and Construction Co.:
	1. *Civil No. 64-832:* Consenting: United Concrete Pipe Corp. Not Consenting: American Pipe and Construction Co. Concrete Pipe
	2. *Civil No. 64-833:* All Defendants Consenting: Kaiser Steel Corporation; United States Steel Corporation Steel Large Diameter Pressure Pipe
	3. *Civil No. 64-834:* Consenting: United States Steel Corporation; United Concrete Pipe Corp.; Kaiser Steel Corporation. Not Consenting: American Pipe and Construction Co. Alternate Large Diameter Pressure Pipe

Date	Event
	4. *Civil No. 64-835:* Consenting: U.S. Industries, Inc.; Smith-Scott, Co., Inc.; United States Steel Corporation; United Concrete Pipe Corporation Not Consenting: American Pipe and Construction Co. Alternate Small Diameter Pressure Pipe
	5. *Civil No. 64-836:* All Defendants Consenting: United States Steel Corporation; Smith-Scott, Co., Inc.; U.S. Industries, Inc. Steel Small Diameter Pressure Pipe
May 27, 1968	Consent Decrees of American Pipe and Construction Co. Entered:
	1. *Civil No. 64-832:* Concrete Pipe
	2. *Civil No. 64-834:* Alternate Large Diameter Pressure Pipe
	3. *Civil No. 64-835:* Alternate Small Diameter Pressure Pipe
December 8, 1968	One Year After Consent Decrees Entered on December 8, 1967, as to All Defendants Except American Pipe and Construction Co. (See Section 5(b) of Clayton Act [15 U.S.C. § 16(b)]).
May 13, 1969	Complaint Filed by State of Utah herein
December 12, 1969	Motion to Intervene as Plaintiffs

Filed September 21, 1970.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

[January 31, 1973]

Appears in Petition for Writ of Certiorari, Appendix A, page 1.

Opinion.

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

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[January 31, 1973]

Appears in Petition for Writ of Certiorari, Appendix D, pages 33-39.